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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1052~~ 48

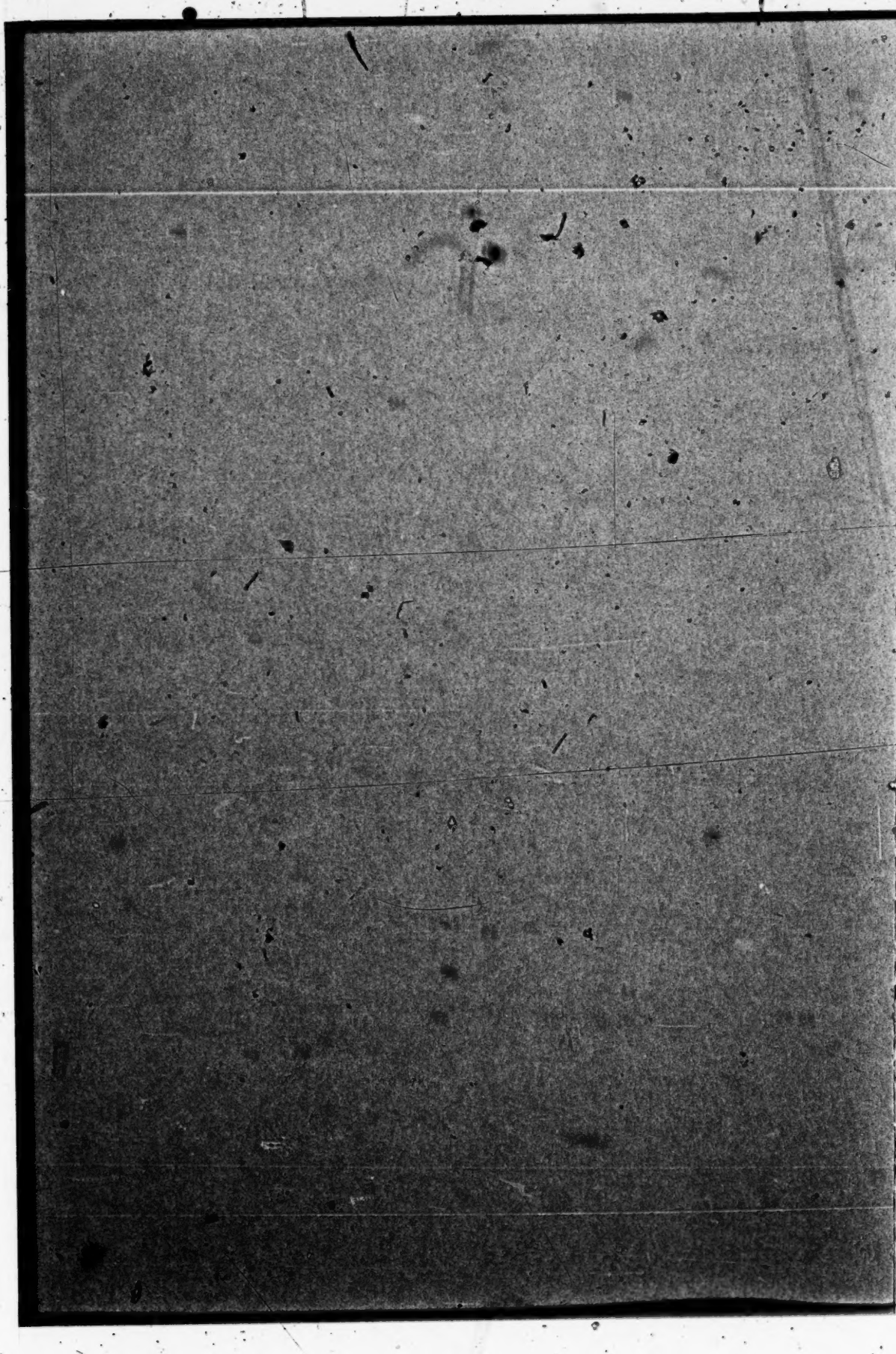
MINNIE E. NASH, PETITIONER,

vs.

FLORIDA INDUSTRIAL COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1967
CERTIORARI GRANTED APRIL 10, 1967



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1032

MINNIE E. NASH, PETITIONER,

vs.

FLORIDA INDUSTRIAL COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 26, 1967

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1. MINNIE ELLEN NASH
My name: (First) (Middle) (Last)

2. 3361 N.W. 67
My address: (Street)

MIAMI FLA
(City) (State)

3. My Age: 57 Telephone No.

4. Stanley Bldg Spec.
(The name of My Last Employer)

1890 N.E. 146
(Street Address)

North FLA
(City) (State)

5.
(Place of work if different from above)

A. SS# 409-24-6136

B. LO # 14

C. Effective Date 5-16-5

D. Report Day _____ M F W C

E. New ☐ Additional ☒

F. Partial: (New) ☐ w/e _____ Earnings _____

G. Usual Occupation Saw Grinder

H. Other Occupation Helper

Interviewer

Date Filed 5-17-5

6. I was employed from 4-65 (Mo. Day Yr.) to 5-14-65 (Mo. Day Yr.) I left or lost this job because: L/W

7. I have earned $_____ GROSS since 12:01 A.M. last Sunday.

8. I received wages in lieu of notice: No ☒ Yes ☐.
Amount $_____, from _____ to _____.

9. I have worked in Federal Service some time during the last 18 months. No ☒ Yes ☐.

10. I have served in the Armed Forces during the past 18 months. No ☒ Yes ☐.

11. I am unemployed, or partially unemployed, able and available for work, and I register for work. Yes ☒ No ☐.

12. I hereby claim benefits under the Florida Unemployment Compensation Law.
I am not seeking unemployment benefits under any other State or Federal System.
I declare the above statements of fact to be true and correct.

My Signature Minnie E. Nash Date 5-17-5

Remarks:

CLAIM FOR BENEFITS

Florida Industrial Commission, Unemployment Compensation Division, Tallahassee, Florida.

Fla. UCB-3 (11-63)

[fol. 1] ADDITIONAL CLAIM—Filed May 17, 1965

1

1. MINNIE Ellen Nash
My name: (First) (Middle) (Last)

2. 3361 N.W. 67
My address: (Street)

Miami Fla.
(City) (State)

3. My Age: 53 Telephone No. 691-6719.

4. _____
(The name of My Last Employer)

(Street Address)

(City) (State)

5. _____
(Place of work if different from above)

A. SS# 409-24-6136

B. LO # 14-11

C. Effective Date 7-25-5

D. Report Day _____ M ~~T W~~ C

E. New ☐ Additional ☒

F. Partial: (New) ☐ w/e _____ Earnings _____

G. Usual Occupation Saw Op.

H. Other Occupation C

Interviewer _____

Date Filed 7-29-5

6. I was employed from _____ (Mo. Day Yr.) to _____ (Mo. Day Yr.) I left or lost this job because: _____

7. I have earned $_____ GROSS since 12:01 A.M. last Sunday.

8. I received wages in lieu of notice: No ☒ Yes ☐
Amount $_____ from _____ to _____.

9. I have worked in Federal Service some time during the last 18 months. No ☒ Yes ☐

10. I have served in the Armed Forces during the past 18 months. No ☐ Yes ☒

11. I am unemployed, or partially unemployed, able and available for work, and I register for work. Yes ☒ No ☐

12. I hereby claim benefits under the Florida Unemployment Compensation Law.
I am not seeking unemployment benefits under any other State or Federal System.
I declare the above statements of fact to be true and correct.

My Signature Minnie E Nash Date 7-29-5

Remarks: Out of Town Returned 7-22-5

CLAIM FOR BENEFITS

Florida Industrial Commission, Unemployment Compensation Division, Tallahassee, Florida.

[fol. 2]

ADDITIONAL CLAIM—Filed July 29, 1965

2

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION DIVISION
TALLAHASSEE, FLORIDA 32304

TO: Minnie E. Nash
3361 Northwest 67th
Miami, Florida

Date Mailed November 15, 1965

Social Security No. 409-24-6136

You have been DISQUALIFIED under Section 443.06 (4) of the Florida Unemployment Compensation Law which provides:

> An individual shall be disqualified for benefits for any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed...

Reason: You are disqualified beginning January 31, 1965, and for the duration of your unemployment which is due to the labor dispute at the factory or other premises of The Stanley Works.

You are entitled to file a request for reconsideration or an appeal within ten days from the date of this notice. The last date for filing such a request or appeal is November 25, 1965. If you do file a request for reconsideration or an appeal, you should do so through your local office, if possible, and should continue to report (when unemployed) until a decision is rendered.

Sincerely,

Thurman D. Burnett

Thurman D. Burnett
Chief of Benefits
JAW/jvb
CC: Local Office 14-0-13

Copy to Employer:

Stanley Building Specialties (020817)
1890 Northeast 146th Street
North Miami, Florida

Fla. UCB-45-3
(4-62)

[fol. 3] REDETERMINATION—November 15, 1965

FORM FLA.-UCA-1 (REV. 3-57)

DO NOT WRITE IN THIS COLUMN

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION DIVISION
Tallahassee, Florida

NOTICE OF APPEAL.

Type Claim UC S.S.No. 409-24-6136

Claimant Minnie E Dodd

Address 3361 NW 67 St

City Miami State Fla

Employer Stanley Works

Address 1890 NE 146 St

City No Miami State Fla

Date Mailed 11-15-5 Delivered in Person

Appeal Filed on 11-20-5

at Miami IV-013
(Local Office) (Itinerant)

I appeal decision of ☒ Claims Examiner:

☐ Appeals Referee for the following reasons

See attached

Signed by
(Person Appealing)

Signed by
(Local Office Representative) (Title)

ORIGINAL – APPEAL TRIBUNAL, TALLAHASSEE

Docket No. 11711 UC

PROGRESS REPORT	BY	DATE
Docketed		
Set up		
Hearing Set.		
Notices Mailed		
Hearing Held		
N.P. Mailed		
Second Hearing Set		
Notices Mailed		
Second Hearing Held		
Decision Dictated		
Decision Typed		
Verified		
Decision Mailed		
Docket Closed		

DATE	HOUR	PLACE	TOWN

ISSUE	DATE	NOTIFY
		Clt. N / Emp. N L

Field Deputy

Interviewer

CLAIMANT'S APPEAL FROM REDETERMINATION—
Filed November 20, 1965

[fol. 4]

NOV 29 1965

NOV 22 1965

MIAMI
FLORIDA CLAIMS

MIAMI
FLORIDA CLAIMS

11. 20. 65
3361 N. W. 67 St
Miami Fla.
33147

State Employment Service
Claims Dept.

Dear Sirs:

Rm 11-23-65

PLEASE WRITE YOUR SOCIAL SECURITY NUMBER BELOW AND RETURN TO US

409 24 6136

I recived a letter from Fla Industrial Commission. Stating I had been disqualified for unemployment Compensation under Section 443-06 labor dispute I was Called back to Work 4. 14-65 Was laid off 5-16-65. and of 10-5-65 I was Called back to Stanley Works. and im Working now. at Stanley Works. I want to (appeal) Will you please let me know What to do about this, Will this letter do? or do I half to come down there? I will be off from Work 25-26-of Nept Week. Can come down on Friday 11-26-65 let me know. by return Mail

Very Best

Minnie E Nash.

[fol. 5] ATTACHMENT TO CLAIMANT'S APPEAL

1. MINNE ELLEN Nash
My name: (First) (Middle) (Last)

2. 3364 Yuma St.
My address: (Street)
Miami Fla
(City) (State)

3. My Age: 53 Telephone No. 691-6719

4. Stanley Bldg. Spec.
(The name of My Last Employer)
1890 N.E. 146 St
(Street Address)
North Miami
(City) (State)

5. _____
(Place of work if different from above)

A. SS# 409-24-6136

B. LO # 14-0-13

C. Effective Date 12-20-65 12/19/65

D. Report Day _____ M/F W/C

E. New ☑ Additional ☐

F. Partial: (New) ☐ w/e _____ Earnings _____

G. Usual Occupation Jetty Man.

H. Other Occupation _____

Interviewer [signature] 12/20/65
Date Filed

6. I was employed from 10/15/65 to 12/17/65 I left or lost this job because: PLANT Closed
(Mo. Day Yr.) (Mo. Day Yr.)
FOR 2 Weeks. Temp. L/O

7. I have earned $ 0 since 12:01 A.M. last Sunday.
GROSS

8. I received wages in lieu of notice: No ☑ Yes ☐
Amount $ _____, from _____ to _____.

9. I have worked in Federal Service some time during the last 18 months. No ☑ Yes ☐

10. I have served in the Armed Forces during the past 18 months. No ☑ Yes ☐

11. I am unemployed, or partially unemployed, able and available for work, and I register for work. Yes ☑ No ☐

12. I hereby claim benefits under the Florida Unemployment Compensation Law. I am not seeking unemployment benefits under any other State or Federal System. I declare the above statements of fact to be true and correct.

My Signature Minnie Ellen Nash Date 12-20-65

Remarks: _____

CLAIM FOR BENEFITS

Florida Industrial Commission, Unemployment Compensation Division, Tallahassee, Florida.

Fla. UCB-3 (11-63)

[fol. 6] NEW CLAIM—Filed December 20, 1965

Florida Industrial Commission—Unemployment Compensation Division

14-0-13 — Clarence Ward — 409-24-6136

L. O. No. — Claimant's Name — Social Security Number

Issue and Cause: Stanley Dispute — Guide Card

I never was on strike in Jan 65 during dispute at Stanley Building Works. I was rehired when dispute terminated, then worked a few weeks, was laid off again, rehired in Oct and worked until 12/17/65 and I was laid off for Lack of work due to plant closing for 2 weeks, will receive clothing pay for 12/65 + 1/66.

To my knowledge I did not file any Charges nor did the union file any for me after being recalled the Apr. 65.

Clarence E. Ward.

Claimant's Signature

LOCAL OFFICE COMMENTS:

We have all 65 weeks - disqualifying Re Stanley Brothers Dispute

FOR C. O. USE

Claims Interviewer — Date 12/20/65

Fla. UCB-64 (3-58)

[fol. 7]

FACT FINDING REPORT—December 20, 1965

7

Docket No. 65-4494-U

FLORIDA INDUSTRIAL COMMISSION

Form Fla. UCA-2 (Rev. 7-65)

UNEMPLOYMENT COMPENSATION APPEAL TRIBUNAL

TALLAHASSEE 32304

NOTICE OF HEARING BEFORE APPEALS REFEREE

Claimant

Minnie E. Nash
3361 N.W. 67 Street
Miami, Florida

S. S. No. 409-24-6136

YOU ARE HEREBY NOTIFIED TO APPEAR

on December 22, 1965 (Date) 9:00 a.m. (Time)

at State Office Building
1350 N.W. 12th Ave., Room 450
Miami, Florida

Copies Mailed To:

- [x] Claimant:
- [x] Employer:
- [x] F.S.E.S.-Miami(14-0-13)
- [x] United Steel Workers Union
- [x] Attorney for employer
- [x] L. Liebman, Field Deputy
- [x] Field Department

on December 14, 1965

Employer

Stanley Building Specialties
1890 N.E. 146 Street
North Miami, Florida

and:

The Stanley Works
Attn: W.J. Buratti
195 Lake St., New London, Conn. 06052

Before James R. Parks an Appeals Referee, for a hearing on the appeal from the determination made by a Claims Examiner for the Unemployment Compensation Division of the Florida Industrial Commission.

The issue involved in this appeal appears on the reverse of this notice as number 12, 17, 4

In addition to the above cited determination, the hearing will include all questions affecting the claimant's right to benefits up to the time of the hearing. The Appeals Referee will determine, if applicable, whether benefit payments to claimant shall be charged to the employment record of the employer.

James R. Parks
(Appeals Referee)

INFORMATION AND INSTRUCTIONS TO THE PARTIES

This hearing is being held to give each of the parties an opportunity to present evidence and testimony in support of its side of the case. The proceedings at the hearing will be mechanically recorded. The Referee will consider the recorded testimony and evidence contained in the Commission's records when deciding the appeal.

APPEARANCES: Each of the parties should be prepared to present evidence on the issues at this hearing. If either, or both of the parties do not appear at the hearing, the appeal will be decided on the evidence available to the Referee.

WITNESSES: If you have witnesses whom you wish to have testify at the hearing, you must notify them and arrange for them to be present. You should bring to the hearing only those individuals who have personal knowledge of the facts you intend to establish. If a witness refuses to appear, notify the Referee at the time of the hearing, and if he deems the testimony of the witness essential, he will issue subpoena to compel his appearance.

POSTPONEMENT: The hearing will be postponed only for good cause and then only when you have notified the Referee prior to the time for the hearing, giving reason for the request for postponement.

LAWYERS: It is not necessary for you to have a lawyer to represent you at the hearing. You may, however, be represented by a lawyer if you desire.

WITHDRAWAL: If you wish to withdraw your appeal, do so in writing.

[fol. 8] NOTICE OF HEARING BEFORE APPEALS REFEREE

8

ISSUES INVOLVED

1. **UNEMPLOYMENT:** Whether claimant was totally or partially unemployed, as provided in Section 443.03(12)(a), Florida Statutes, 1963

2. **MADE CLAIM:** Whether claimant made a claim for benefits with respect to his week of unemployment in accordance with such regulations as the Commission may prescribe, as provided in Section 443.05(1), Florida Statutes, 1963.

3. **REGISTRATION AND REPORTING:** Whether claimant has registered for work at, and thereafter continued to report at, an employment office in accordance with such regulations as the Commission may prescribe, as provided in Section 443.05(2), Florida Statutes, 1963.

4. **ABLE AND AVAILABLE FOR WORK:** Whether claimant has been able to work and available for work, as provided in Section 443.05(3), Florida Statutes, 1963.

5. **WAGE CREDITS:** Whether claimant has been paid wages for insured work equal to twenty times his average weekly wages during his base period; provided that no unemployed individual shall be eligible to receive benefits if his average weekly wage is less than twenty dollars ($20.00), as provided in Section 443.05(5), Florida Statutes, 1963.

6. **VOLUNTARY LEAVING:** Whether claimant voluntarily left his employment without good cause attributable to his employer, as provided in Section 443.06(1), Florida Statutes, 1963, as amended.

7. **DISCHARGED FOR MISCONDUCT:** Whether claimant was discharged for misconduct connected with his work, as provided in Section 443.06(1), Florida Statutes, 1963.

8. **FAILURE TO APPLY:** Whether claimant failed without good cause to apply for available suitable work when so directed by the Employment Office or the Commission, as provided in Section 443.06(2), Florida Statutes, 1963, as amended.

9. **FAILURE TO ACCEPT:** Whether claimant failed without good cause to accept available suitable work when offered to him by Employment Office, Commission, or employing unit, as provided in Section 443.06(2), Florida Statutes, 1963, as amended.

10. **WAGES IN LIEU OF NOTICE:** Whether claimant was paid wages in lieu of notice, as provided in Section 443.06 (3)(a), Florida Statutes, 1963.

11. **WORKMEN'S COMPENSATION BENEFITS:** Whether claimant was paid compensation for temporary partial disability, temporary total disability or permanent total disability under the Workmen's Compensation Law of any state or under a similar law of the United States, as provided in Section 443.06(3)(b), Florida Statutes, 1963, as amended.

12. **LABOR DISPUTE:** Whether claimant's total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment, or other premises at which he is or was last employed, as provided in Section 443.06(4)(a)(b), Florida Statutes, 1963.

13. **BENEFITS UNDER ANOTHER STATE LAW:** Whether claimant has received or is seeking unemployment benefits under an unemployment compensation law of another state or the United States, as provided in Section 443.06(5), Florida Statutes, 1963, as amended.

14. **FRAUD:** Whether claimant made any false or fraudulent representation, knowing it to be false, for the purpose of obtaining benefits contrary to the provisions of this Chapter, as provided in Section 443.06(6), Florida Statutes, 1963.

15. **TIMELY APPEAL:** Whether an appeal was filed by one of the parties entitled to notice of the examiner's determination within ten days after the mailing of such notice to the parties' last-known addresses, or in the absence of such mailing, within ten days after the delivery of such notice, as provided in Section 443.07(3)(a), Florida Statutes, 1963.

16. **WAIVER OF OVERPAYMENT:** Whether claimant is entitled to waiver of recovery of the sum he received as benefits to which he was not entitled, as provided in Section 443.07(6)(b)(c), Florida Statutes, 1963.

17. **CHARGES TO EMPLOYER'S EMPLOYMENT RECORD:** Whether the benefit payments made to claimant shall be charged to the employment record of employer (–), as provided in Section 443.08(3)(a), Florida Statutes, 1963.

18. **RETIREMENT PENSION OR ANNUITY:** Whether claimant has received, or is eligible to receive, from a base period employing unit, income from a retirement, pension or annuity program, as provided in Section 443.06(8), Florida Statutes, 1963, as amended.

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[fol. 9]

[fol. 10]

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION APPEAL TRIBUNAL
TALLAHASSEE, FLORIDA

In the Matter of:

Appeals Docket No. 65-4494 U
Minnie E. Nash
3361 N. W. 67th St.
Miami, Florida
S.S. #409-24-6136

Employer: Stanley
Building Specialties
1890 N. E. 146th St.
North Miami, Florida

TRANSCRIPT OF TESTIMONY—December 22, 1965

This hearing is being held before Appeals Referee James R. Parks in the matter of Appeals Docket No. 65-4494 U. Claimant's name is Minnie E. Nash, 3361 N. W. 67th St., Miami, Florida, Social Security No. 409-24-6136. The employer is Stanley Building Specialties, 1890 N. E. 146th St., North Miami, Florida. Hearing is being held at the Florida State Office Building in Miami, Florida, on December 22, 1965. The claimant is present and will testify. Present on behalf of the employer is Mrs. DeRosa, Employer's personnel director and plant nurse. Also present to testify is Mr. Liebman, a Field Deputy in the Miami office of the Commission. The claimant is represented by counsel, Mr. Richard Horn. The employer is also represented by counsel, Mr. Allen. Both of these gentlemen live in Dade County.

Now, it is necessary that your testimony be taken under oath, so Mrs. Nash, Mrs. DeRosa and Mr. Liebman, if you

will raise your right hands and be sworn in, please? Do you and each of you solemnly swear that the testimony which you are about to give in this cause will be the truth, the whole truth and nothing but the truth, so help you God? For the record, all parties answered in the affirmative. Now, Mr. Horn, Mr. Allen and myself have agreed upon a stipulation to be entered into in this matter. This is also acceptable to claimant and Mr. Allen will recite the stipulation. Now, Mr. Allen, if you will, please.

Mr. Allen: It is stipulated at Miami, Florida, December 22nd, 1965. It is hereby stipulated by and between the United Steel Workers of America, Local No. 5571, AFL-CIO, and Stanley Building Specialties, 1890 N. E. 146th Street, Miami, Florida, hereafter referred to as the Employer, and the Claimant herein, that Claimant had notice of the hearing to be held on December 22, 1965, at 9 A. M. at Room 450, State Office Building in Miami, Florida, re- [fol. 11] garding the appeal of said claimant for unemployment compensation benefits; that claimant became employed by Employer prior to January 30, 1965; that subsequent to becoming employed by the Employer but before the last mentioned date, claimant became a member of the Union. Claimant herein is represented by the Union with respect to representation by the Union for the worker with the Employer; that the Union is or was elected bargaining agent for the Claimant herein and all other employees in an appropriate unit at the Employer's operation, and that the Union has or has had a collective bargaining agreement with the Employer; that the last contract entered into between the parties became effective February 2, 1963, and expired January 30, 1965; that Claimant herein was an employee of Employer at Employer's plant located at 1890 N. E. 146th St., Miami, Florida; that prior to January 30, 1965, the Union and the Employer entered into negotiations on a new collective bargaining agreement; that impasse on such negotiations was reached January 30, 1965; that labor dispute commenced January 31, 1965, at the premises of the

Employer at 1890 N. E. 146th St., Miami, Florida, where Claimant was employed between the Employer and employees; that such dispute concerned terms and/or conditions of continued employment with the Employer for employees; that on January 30, 1965, Union members held an election and voted to strike Employer; that at 12:01 A. M. on January 31, 1965, a picket line was established at the premises of the Employer at which Claimant rendered services; that Claimant regularly performed active picket duty at the premises at which she was employed and withheld services from the Employer; that all workers of the Employer did not picket and refuse to work, therefore after January 31, 1965 the Employer continued to operate its business; that on March 30, 1965, a Union representative contacted the Employer's plant manager and offered to return the striking workers unconditionally to their jobs; that on April 15, 1965 an employer representative informed the Union staff representative that the Employer would take some of its striking workers back but not others; that on April 5, 1965 the picket line was removed from the Employer's premises; that on April 6, 1965 the employer began processing those striking workers who were being taken back to work to their jobs; that the claimant involved in this hearing was taken back to work on or about April 6, 1965; (discussion in background) that claimant herein was returned to work by Employer unconditionally; that after the picket line was removed from the Employer's premises the Employer refused to permit a group of approximately 50 striking employees from returning to their work; that these employees, through the striking Union, on April 6, 1965, filed unfair labor practice charges with the National Labor Relations Board against the Employer, seeking among other things, reinstatement to their former jobs and back pay for the wages lost during the time that they had lost work because of the Employer's refusal to [fol. 12] permit them to return to work on or after April 6, 1965; that these unfair labor practice charges are unre-

solved and pending before the National Labor Relations Board as of December 22, 1965; that Claimant herein did not file an unfair labor practice charge against the Employer on April 6, 1965, and was not one of the persons listed on said unfair labor practice charge as having been discriminatorily discharged; that subsequent to being returned to work unconditionally on or about April 6, 1965, Claimant herein was separated from her work by Employer one or more times for "slow production"; Claimant was never told by any representative of the employer that her layoff was due to unfair labor practice charges filed with the National Labor Relations Board. After earlier having been separated from her job, Claimant herein, through the Union, with the Union acting with her knowledge and consent and in her behalf, filed or caused to be filed with the National Labor Relations Board unfair labor practice charges regarding her having been separated from her job prior to June 17, 1965; that Claimant's position before the National Labor Relations Board with regard to this layoff was that this layoff was motivated because of her Union activities and was therefore a violation of the National Labor Relations Act; that Employer's position before the National Labor Relations Board with regard to this layoff was that claimant herein was laid off purely for economic reasons; that the relief sought by claimant herein from the National Labor Relations Board with regard to the unfair labor practice charge, mentioned immediately above, included reinstatement to her former or an equivalent job and back pay for time lost because of the contended discriminatory layoff;

(End of Side 1, Record 1)

(Mr. Allen continuing) that the unfair labor practice charges filed by claimant herein on June 17, 1965, are presently unresolved and pending before the National Labor Relations Board as of December 22, 1965.

Referee: Now, could we have your assent to this, Mr. Horn?

Mr. Horn: Yes, I assent to that.

Referee: Well, thank you very much. Now, Mrs. Nash, for the record, please, will you state your name?

MINNIE E. NASH.

A. My name is Minnie Nash.

Q. You want to make sure that you speak into the microphone, about the way you talk into a telephone.

[fol. 13] A. I live at 3361 N. W. 67th St., Miami, Florida.

Q. Was your social security number correct as it appeared on your notice of hearing?

A. That's right, yes, it was.

Q. How old are you?

A. Fifty-three.

Q. Are you working?

A. No, well, not now, but I guess I'll go back to work.

Q. What kind of work do you usually do?

A. —operator.

Q. The file indicates that you first went to work with Stanley Building Specialties in 1962. Is that correct?

A. It might have been '61 or '62, I don't remember just when.

Q. And after you were hired you joined the Union, the United Steel Workers of America? Did you?

A. (Claimant answers before Referee finishes—answer not understandable.)

Q. Now, between January 1, 1965 and April 6, 1965, did you work at Stanley at all?

A. You mean after we went on strike?

Q. You went on strike, did you?

A. Yes, the last of January, 31st of January, I believe that is.

Q. There was a picket line at the plant at which you worked, did you do picket duty?

A. Yes, yes I did.

Q. Regularly?

A. No. Just sometimes I'd go up.

[fol. 14] A. Well, sometimes I'd go at 6 in the morning and stay 'til 12 and then maybe I'd skip two or three days before I'd go back.

Q. Well, during the time this picket line was in existence you did not go to work, is that it?

A. That's right, I didn't.

Q. Were you called to work by any employer representative, at the time the picket line was in existence?

A. No, I wasn't.

Q. Now, the picket line was taken down April 5, 1965, is that correct?

A. That's right.

Q. When after that date was it that you went back to work?

A. Well, I thought it was around the 14th, I believe that is when it was.

Q. Of April?

A. April.

Q. Now, after that—

A. And I was laid off the 16th of May.

Q. 16th?

A. 16th of May, I think.

Q. And on the 17th of June you had the Union or the Union did it for you, file charges with the National Labor Relations Board?

A. Yes, they did.

Q. With respect to that separation, the reasons for it?

A. Yes, sir.

Q. Now, you wanted reinstatement at work and back pay for time you had lost because of being separated from your job?

A. That's right.

[fol. 15] Q. Has there been any action taken with respect to these charges?

A. Well, I think so, I'm not sure.

Q. But they have not been resolved, they are still pending, is that right?

A. I think so.

Q. Do you recall that you worked some time—
A. October the 5th.
Q. You went back to work October 5th?
A. That's right.
Q. You were not ordered returned to work that date by—
A. I got a certified letter.
Q. From the employer? What I am getting at is, they weren't forced to put you back to work at that time by the National Labor Relations Board?
A. Oh, no, no.
Q. They called you back?
A. I don't reckon they were. I just got the letter.
Q. Now, after October 5 you were again separated from your job, is that right?
A. Well, the last Friday we were closing down for two weeks.
Q. Did you work up to last Friday?
A. Yes, I did, Friday noon, at 11 o'clock Friday.
Q. The 17th?
A. Yes.
Q. You were laid off this time?
A. No, it was a shutdown.
[fol. 16] Q. Anything further, Mrs. Nash, do you have any point that you would like to—
A. No, I think that is about it.
Q. Well, thank you very much.

Mrs. DeRosa, for the record please, will you state your name?

GENEVIEVE DEROSA.

A. Genevieve DeRosa.
Q. And you are personnel director for—
A. Stanley Building Specialties.
Q. Was there a shutdown of the plant December 17, 1965?
A. That's correct.

Q. Was there a specific reason for this?

A. Well, there is usually an annual shutdown while they do repair work.

Q. It is customary for the employer to shut the entire plant down over the Christmas and New Year's Holidays?

A. That's right.

Q. Was the plant shutdown for holiday vacation purposes the reason for Mrs. Nash's separation from her job? Her unemployment on December 17th?

A. Well, do I understand that she is taking a vacation, is that it?

Q. Well, she is not working because the plant is shutdown?

A. Shutdown, that is right, and not because she is taking a vacation.

Q. Perhaps it was a poor choice of words. Plant shutdown. Anything further now?

A. No, sir.

Q. Thank you very much.

[fol. 17] Q. Mr. Liebman, would you for the record, state your name?

LEON LIEBMAN.

A. Leon Liebman, Field Deputy Miami Office.

Q. You have some statement you would like to make with respect to this matter?

A. No, other than that I usually contact the employer and the Union representative to find out, if there is a case pending before the National Labor Relations Board, and I have been told that there has been no decision made at this time and that the case is still pending.

Q. Thank you very kindly. Mr. Horn, do you have any questions that you would like to direct to Mrs. Nash, Mrs. DeRosa or Mr. Liebman?

RICHARD HORN. [sic]

Mr. Horn: When did you apply for unemployment compensation the first time?

Mrs. Nash: In May, I don't remember what day.

Referee: Excuse me, please, make sure that you speak into the microphone.

Mrs. Nash: In May, I don't remember what day.

Mr. Horn: All right. Do you recall whether or not you began drawing, actually receiving checks prior to filing the charges with the National Labor Relations Board?

A. Well, I started drawing my pay just like I always did, I mean there wasn't nothing to keep me from drawing it. At the close of the third week I got my check and drawed it up until I went back to work.

Mr. Horn: Is it correct that you left work, that you were laid off on May 16?

Mrs. Nash: That's right.

Mr. Horn: And the charges were filed on June 17, so if you received it in three weeks, did you receive it before the charges were filed?

Mrs. Nash: I don't remember, I don't remember.

[fol. 18] Mr. Horn: Did you have any idea at the time that you were drawing the unemployment that there was any reason for your disqualification from drawing it?

A. No, sir.

Referee: Do you have questions for Mrs. DeRosa?

Mr. Horn: No.

Referee: All right. Mr. Allen, do you have any questions that you would like to direct to Mrs. Nash or Mrs. DeRosa?

Mr. Allen: Well, there is one thing I would like to direct to Mrs. DeRosa first. Mrs. Nash's unemployment at this time has nothing to do with anything except the fact that the plant is closed down, is that right?

Mrs. DeRosa: That's right.

Mr. Allen: And when the plant opens back up, as far as you know she will go back to work, is that correct?

Mrs. DeRosa: That's right.

Mr. Allen: That's all. That's all I have for her.

Mrs. Nash, at this time were the unfair labor practice charges resolved in your favor, the one that is pending, the June 17th charge, would you receive any money from that?

Mrs. Nash: I am receiving money, yes, I am.

Q. Back pay? (inaudible remark in background.)

Q. Were the unfair labor practice charges filed on April the 6th, that was the one with the list with a lot of people on it, with 50 people on it, you know the list I am talking about? You know it is where they offered to come back and the company said no, we're not going to take back 50 of you for various reasons, and then the union filed unfair labor practice charges,—?

A. Well, I—

Q. Did you know about those charges, did you know they were filed?

A. No. The only thing I know that I was called on the phone to come back to work and I took my lunch and went up there that day but Mr. Burger called us all in one at a time and interviewed up but we didn't work and he told us we could come back to work without a contract but the same job and the same rate of pay.

[fol. 19] Q. The charges were filed—I think you may get this from me because you may not know. The charge was filed April the 6th. You know what I am talking about? The unfair labor practice charge which was filed on April the 6th?

A. No, I don't know anything about it.

Q. When these people were not taken back on that day, no they didn't take back the group—

A. Well, I knew there was 40 or 50 that didn't go back.

Q. That's right, that didn't go back. Did you know that unfair labor practice charge, that they filed unfair labor practice charges about that?

A. No, I didn't.

Q. Were you a member of the union at that time?

A. Yes, I was.

Q. You were a member of the union at that time when they filed this on April the 6th?

A. Yes.

Q. All right. You understand, don't you, that under the labor law that the union represents you in all matters dealing with Stanley, is that correct?

A. I think so.

Q. To your knowledge they represent you?

A. Yes.

Q. Now let me ask you. During the period from April 30th, from April 6th to May 16th, in other words, that was the time you were brought back and layed off and that was the time before they brought you back again?

A. Well, I went up there but I don't think I went to work until the 14th of May.

Q. All right. You went to work on the 14th of May, is that right?

A. Yes, but—

[fol. 20] Q. I thought you were laid off on the 14th?

A. That's right. I went to work on the 14th of April I think. And was laid off the 16th of May.

Q. All right. Now, when did you come back to work for the company again?

A. The 5th of October.

Q. Fifth of October? During that time did you work elsewhere?

A. No, I didn't.

Q. Did you seek work elsewhere?

A. Yes, I did.

Q. Where?

A. Well, its over on—a place where I used to work, and take old metals, where I used to work, and I also sought work down here at the Employment Office.

Q. All right. And what did you find out in each instance?

A. Well, they told me they didn't need nobody, that they didn't have anything to do, both places that I had been working.

Q. Were those the only three places that you attempted to get work?

A. No, tried another place down below my house that's called—Industrials, that's place there and I couldn't get no work there, and a few places that I found in the paper. I don't remember the names of them and I called on the phone.

(End of side 2, Record 1) (Mr. Allen questioning Claimant)

Q. So you brought up a labor practice charge, had it filed in your behalf on or about June the 16th, that's correct, right?

A. I think it is.

Q. The 17th I think it is. But you didn't go back to work for the company until, when did you come back, September, is that correct?

A. No, October.

[fol. 21] Q. You came back in October. You didn't work for Stanley between the period of June 17th and October, whatever it was, right?

A. That's right.

Q. Now, during that period of time were you paid unemployment compensation?

A. Yes, I was.

Q. You were paid unemployment compensation? During that time was the unfair labor practice charge pending, the one that was filed on the 17th of June?

A. Well, I imagine it was.

Q. In other words, you had not heard from the Board one way or the other, is that right?

A. No, I hadn't, that's right.

Q. So, to the best of your knowledge that unfair labor practice charge was pending before and unresolved by the

National Labor Relations Board during the period in which you received unemployment compensation, is that correct?

A. That's right.

Q. That's all I have.

Referee: All right. Mrs. Nash, did the April 6th charge that was filed by the workers who weren't taken back to work relate to you in any way?

Mrs. Nash: Well, I don't know.

Q. In other words, you were taken back so that charge has nothing to do with you, is that correct?

Mrs. Nash: Well, I don't imagine it did.

Q. All right. Mr. Horn, do you have any argument that you—

Mr. Horn: Yes. We heard from the testimony of the claimant here that, in the stipulation of the facts cited, that [fol. 22] she went on strike which she admits to, that she was taken back to work by the company on April the 14th. She worked until May 16, 1965, which is no problem. All right, then, she was laid off by the company and the company gives as its reason throughout that she was laid off for economic reasons. She was taken back to work on October 5th and she drew unemployment compensation for the period from May 16, 1965 to October 5th, 1965. Now we contend that she filed for this unemployment compensation in May as she stated, in good faith. She received her checks prior to any charges being filed, prior to any possibility of what might be considered a labor dispute existing, and received her unemployment compensation in good faith throughout that period. Now, the company asserts here, as stated, that this layoff was due to economic reasons. She was told "slow production" was the reason for her layoff and I can't in any way see how the company then can contend that her layoff was, under the terms of the statute, "due to a labor dispute." Certainly no labor dis-

pute existed at the time she was laid off and no labor dispute existed up until the time as a result of her layoff that the unfair labor practices were charged against her. I am aware of some cases where the District Courts of Appeal have held that a labor dispute may continue until it is finally settled or terminated. However, an individual's unemployment due to the labor dispute can terminate at some point prior to the final—of the labor dispute. We contend that this is the situation here. Her unemployment due to the labor dispute was—occurred during the period of the strike and ended when she was taken back to work on April 14th and her layoff subsequent thereto couldn't in any sense be considered to be due to a labor dispute. The only labor dispute that occurred subsequent to that time and as a result of charges that she filed a month afterwards, and as a matter of fact, after she had already begun receiving unemployment compensation. So I don't believe that the Commission could hold that her unemployment was due to a labor dispute. And apparently the position that the employer is urging the Commission to take is to construe the statute so that any time any charges are pending before the National Labor Relations Board against the employer that any layoffs for whatever reason they might occur, are "due to" the labor dispute. Now this seems to me patently absurd and I don't believe that the Commission could place such a construction on the statute. And I don't believe the courts would place such a construction on the statute. As I stated before, the labor dispute may continue, but unemployment due to the labor dispute does not continue and it doesn't go on, unemployment due to the labor dispute doesn't go on until the labor dispute is finally settled and it didn't here. I would further say, primarily [fol. 23] for the record, that a finding by the Commission that this statute would be applied here to this claimant so as to deprive her of benefits, it would not only be an incorrect construction of the statute but it would also be an unconstitutional construction of the statute under the privileges and immunity clause of the 14th amendment and the

supremacy clause of the Constitution of the United States. It has been held in the case of Henry Quarles 158 U. S. 532, that the right to inform the United States authorities of violations of laws is a privilege and immunity of citizens of the United States which is protected by the Constitution of the United States and cannot be abridged by the State. This is the type of interest that grows out of the relationship between the citizens of the national government that is to be protected. Now here under the construction of the statute against the petitioner, she would be penalized for exercising her privilege to inform the United States Government that its laws are being violated by the employer in this case, and for the reason that she under stay would be depriving her of unemployment benefits to which she would unquestionably be otherwise entitled. The employer here stated the reasons for this unemployment are economic and so there wouldn't be any question that she would be entitled to unemployment compensation benefits but for the fact that she exercised right to inform the United States Government of violation of its laws. I don't believe that the language in the statute where it says "unemployment due to a labor dispute" and the context of the unemployment statute have been considered to have the meaning that the employer would seek to have placed upon it here in the light of the purpose of the Act, which is the guaranty of subsistence living to people who are unemployed for economic or other reasons unless one of the specific exclusions of the act is applicable. I don't believe the employer can contend that the labor dispute has the same meaning under this act as it has under the National Labor Relations Act, and also the Act. Each of these statutes was passed for a specific purpose and the purpose of this act must be considered to bar an interpretation such as the employer would seek to put upon it. Now, if this construction were to be taken the employer could break a union at any time simply by requiring its employees, the employees would file unfair labor practices

that this was the reason and they would be barred from obtaining unemployment compensation benefits because this was "due to a labor dispute." As long as it took to wear down the claimants the employer could continue filing themselves unfair labor practice charges and as long as those [fol. 24] charges were pending under this interpretation no one could collect unemployment benefits. Therefore, I don't believe the Commission could place this construction upon the statute and the claimant here should not be disqualified from any claim that she has subsequent to the date of her reinstatement to employment by the employer on April 6 or thereabouts.

Referee: Thank you very much. Mr. Allen?

Mr. Allen: Well, next, the employer would say that the charges filed on April 6th as well as any other charge filed by the Union, in fact does relate to the claimant here, inasmuch as she is a member of the Union, pays dues in the Union, and if acts as her agent in all matters regarding wages, hours, and working conditions. Therefore the mere fact that her name may not be listed as a person seeking a particular remedy does not necessitate or necessarily lead to the conclusion that she is in no wise involved in a labor dispute. No. 2, with regard to claimant's counsel's contention that there was no labor dispute after April 6th, firstly, it is clear that there can be a labor dispute even under the Florida law any time there is actually any question or dispute either that relates to wages, hours, working conditions, terms of employment, anything of this nature is considered and construed by the District Courts of Appeal in Florida to be a labor dispute. The position that the claimant takes would, in effect, say that unless there is a strike and a picket line there cannot be a labor dispute. Obviously, there are many ways that there can be a labor dispute without a picket line and striking. Case law will clearly establish this. Therefore, the company would respectfully submit that the labor dispute which initiated when the Union went out on strike has never ceased, it is continued, there has never been a contract signed. That was

the purpose for the strike, it was because there was a problem with regard to wages, hours and working conditions. An attempt was made to negotiate about this matter. They went out on strike when they reached an impasse and they still have not solved the basic problem for which they went out on strike. There is no contract between the Union and the Company at this time. But even if this labor dispute did terminate it is clear that when the claimant was in fact laid off, regardless of the reason for which she was laid off, that she in fact questioned the employer's right to lay her off. Therefore another labor dispute arises at that point. This obviously is a dispute concerning wages, hours, working conditions, employment, conditions of employment, etc. Therefore, again there is a labor dispute and her unemployment is directly due to the labor dispute that is in active progress, because it is in active progress. And in previous cases and at other times, the claimant's counsel has con- [fol. 25] tended that the unemployment is not due to a labor dispute, but that the dispute occurred and then the unemployment happened. Well, in any law suit it is clear that even though I, for example, may be injured today I may not file suit for a year, and as long as the statute of limitations has not passed by I can still file my suit, but when I go in for damages or I go in to prove up my claim I go back to the initial date that the event occurred. Therefore, any claim that she waited to file, waited six days to file an unfair labor practice, or she waited three weeks to file an unfair labor practice, has no relevance whatsoever. It is clear that as long as she filed the unfair labor practice charge within the six months statutory limitation period then in fact everything that she—on which she bases her claim is dated from the actual incident when she was laid off, denied reinstatement, discharged, or whatever the claim may be. Therefore, again I would assert, the company would assert, that another labor dispute actually arose with the employer laying off of the claimant herein and her non-acceptance of the reasons given by the employer for this. Now the counsel for the claimant talks in

terms of constitutionality, penalty to the employee, and so forth and so on. There is also another side to the picture, which is this, one, if an employee files an unfair labor practice charge and at the same time files unemployment compensation claims, and assume that these cover the same period of time, and she wins both of those cases, then, one, she is going to get reinstatement by the National Labor Relations Board, she is going to get full back pay from the employer as ordered by the National Labor Relations Board, and two, she is going to get unemployment compensation which the State will have to pay for and the employer will have to pay for. Therefore she is going to get a tremendous windfall inasmuch as unemployment compensation is not credited under the National Labor Relations Act against back pay, that is assigned to be paid by the National Labor Relations Board. For example, if the Board was to say, you owe X $100 in back pay and in the meantime she had received $50 in unemployment compensation and $50 awarded somewhere else, they would say, O. K. you can deduct the $50 that she earned working at another job but you cannot deduct the amount of money that she earned or that she received as unemployment compensation.

(End of Side 1, Record 2)

(Side 2, Record 2) (Mr. Allen continuing)

Therefore, you would say that she would get not only a windfall, she would get the windfall, the employer would be [fol. 26] penalized, by paying her twice in some amount; not the full amount but in some amount, and so would the State of Florida end up paying her. Therefore, in effect, she would—the effect of the statute is too true, to give some people who don't have money, some money, but if she gets money, why pay her twice? That would defeat the meaning of the statute. Further, the employer would contend that a person in such a situation should have to elect the remedy. They should have to choose to go to one tribunal or the other. Otherwise, quite to the contrary from

what the claimant's counsel says, that any that was fired would do these things automatically. If the law were to the effect that she could get both or get reinstatement, every time anybody was laid off they would automatically file unfair labor practice charges. They would automatically seek unemployment compensation. Why not try both of them, they have nothing to lose. But if they have to make up their minds, if they think they were discriminatorily discharged or laid off, then, and they are really sincere about it, they should go to the National Labor Relations Board and if they find it is true then they will get their remedy. If they don't then they should say, O. K., the unemployment was justified, therefore I should get my unemployment compensation and they would get it. That's the position the employer takes with respect to them. Further, the employer would respectfully submit that in this instance this claimant has been paid a considerable amount of money when actually she was not entitled to receive it inasmuch as she had an unfair labor practice charge pending regarding her employment, to which she has been paid for the period of some time in June to some time in October, and granted for the first two and a half weeks in June there was not unfair labor practice charge pending in her behalf, but on the 17th of June to the present time there has been an unfair labor practice charge pending and unresolved with the National Labor Relations Board. The employer would respectfully submit that these charges were incorrectly paid and that it would be highly prejudicial to the employer and to the employer's experience rating if he were charged for these amounts. Therefore the employer would respectfully request that his experience rating account be credited with any amount which was paid to this employee during this period of time. Now, with regard to this, the relationship of time, counsel for the claimant did not mention that and we discussed it earlier off the record. This party here was in fact recalled to work, laid off, recalled again and again laid off, the issue being whether or not inasmuch as she filed unfair labor practice

charges the first time she was laid off, do these unfair labor practice charges and the concurrent remedies that go with the unfair labor practice charges in the event she [fol. 27] were to win them, would these also apply to the second layoff where she has not in fact filed unfair labor practice charges with regard to the second layoff. Counsel for the employer respectfully submits that he is not aware of the precise state of the law at this time but the conclusion at this point is, my conclusion at this point is, that if for example the claimant were laid off, were called back to work June 1, were laid off June 2, called back June the 3rd, laid off again June the 4th, the National Labor Relations Board would probably find that the second layoff was discriminatory regardless of whether or not she filed a charge and therefore would charge the employer with back pay for that period and also order her reinstatement regardless of the fact that she had been taken back, and in each instance the case would be based on the motive for the second layoff. If the Board found that the second layoff was motivated by anti-union reasons then the Board would most probably O. K. the charge, for regardless of whether or not the time period asserted in the charge included the second layoff. So, therefore, conversely, if there were say a period of a year between the first layoff and the second layoff, the Board may well find or might well find that the second layoff was not discriminatory any way, that when the party came back after the first layoff that that terminated any liability with regard to the unfair labor practice charge pending during the first unfair labor practice charge and therefore that the second layoff was completely for cause and then there would be no dispute with regard to the second layoff. All this is background material for the employer's conclusion that regardless of the state of the law it is clear that the second layoff involved herein, in the second layoff involved herein there is a good chance that the employee may well receive some remuneration or that she may have an order of reinstatement entered in her behalf by the National Labor Relations Board. This

being the case, it is clear that the labor dispute could possibly be continued to include the second layoff regardless of whether or not she filed an unfair labor practice charge. This being the case, the employer would further submit that the labor dispute, that the unfair labor practice charge filed with regard to the first layoff does in fact include any subsequent layoff until the Board finally makes a determination as to whether or not the second layoff was discriminatory. If in fact the Board decides that it was, then obviously the remedy will cover both the layoffs. If it wasn't, then it would only cover one. But there is enough chance in each instance that it will cover both layoffs that it is clear that the labor dispute has not been resolved by the National Labor Relations Board until the issue is totally reviewed, until the initial charge is totally resolved and it is found that the second layoff has nothing to do with anti-union motives. That is all I have to say.

[fol. 28] Referee: Thank you very much. Mr. Horn?

Mr. Horn: I would like to rebut at two points that counsel made. First of all, this last point, that the second layoff might be considered discriminatory. Well, this seems to be to be an untenable, virtually an absurd contention. The employer's representative has testified here that every worker in the factory was laid off for Christmas holidays so I fail to see how any dire consequences could come of that. Secondly, as to his argument that this is a penalty for the employer that may be forced to put up certain sums twice, first of all it takes, this case right here shows, it takes at least a year and often more before these issues can be resolved before the National Labor Relations Board. And to require employees from the date that any dispute occurred until final settlement would virtually negate the unemployment compensation act's purpose of providing subsistence income for these people during interim periods when they are out of work, and the fact, I don't know whether counsel's statement that unemployment compensation is not deducted from Board awards is correct or not. I wouldn't doubt that it is not deducted. However, even

if it were it seems to me that this would fall within the concept of a collateral source just as if this woman's relatives gave her money to live on during this period should unemployment compensation be unavailable. That seems to be irrelevant not only to the Court's determination but conversely that should be irrelevant to the Commission's determination as to the applicability of the statute.

Referee: Thank you very much. There being no further testimony in this case, this hearing will now close. You will all be notified by mail regarding the outcome. Thank all of you very much for appearing.

[fol. 29]

NOTICE OF DECISION OF APPEALS REFEREE

(See opposite) ☞

FLORIDA INDUSTRIAL COMMISSION

UNEMPLOYMENT COMPENSATION APPEAL TRIBUNAL

Tallahassee, Florida 32304

Claimant:

Minnie E. Nash
3361 NW 67th Street
Miami, Florida

Social Security No. 409-24-6136

NOTICE OF DECISION OF APPEALS REFEREE

JW

Decision No. 65-4494-U

We enclose a copy of the decision of the Appeals Referee on this case.

This decision will become final unless within ten (10) days after the date it is mailed, you file an application for leave to appeal to the Board of Review.

If you have any question as to the effect of this decision or as to the procedure for appealing to the Board of Review, it is suggested that you consult the local office of the State Employment Service.

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JAN 21 1966
FLORIDA INDUSTRIAL COMMISSION
BOARD OF REVIEW

Employer: No. -020817

Stanley Building Specialties
1090 NE 146th Street
North Miami, Florida

James R. Parks
Appeals Referee
James R. Parks

Other copies mailed to:
FSES - Miami (14-0-13)
Benefit Department
United Steel Workers Union, Local 5571
Leon Liebman, Field Deputy
Field Department
Legal Department
Employer's attorney
Claimant's attorney

JAN 14 1966
Date of mailing this decision

JAN 24 1966
Last date for filing appeal to Board of Review

The Stanley Works
195 Lake Street
New Britain, Connecticut 06052

Attn: W. J. Buratti

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JAN 17 1966
BENEFIT DEPARTMENT
Unemployment Compensation Division

Form Fla. UCA-7 (Rev. 1-59)
190

[fol. 30]

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION APPEAL TRIBUNAL
TALLAHASSEE, FLORIDA

Unemployment Compensation Claim
Appeal from Determination of Claims Examiner
Docket No. 65-4494-U

In the Matter of:

Social Security Account No. 409-24-6136
(Claimant-Appellant),

Employer No. —020817

DECISION OF APPEALS REFEREE—January 14, 1966

After due notice to the parties, hearing was held at Miami, Florida, on December 22, 1965. The claimant and an employer representative appeared and testified. A field deputy of the Commission also appeared and testified. Both the claimant and the employer were represented by counsel.

Issues Involved: Whether claimant's total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment, or other premises at which she is or was last employed, as provided in Section 443.06(4)(a)(b); and whether the benefit payments made to claimant shall be charged to the employment record of employer (—020817), as provided in Section 443.08(3)(a), Florida Statutes, 1963.

History of Case: Claimant filed an initial claim for unemployment compensation benefits effective December 20, 1964, and filed additional claims effective May 16, 1965, and effective July 25, 1965, then filed another initial claim on December 20, 1965. On November 15, 1965, the Claims

Examiner made a determination disqualifying claimant for benefits for the period beginning January 31, 1965, because unemployed due to a labor dispute in active progress at the premises at which she is or was last employed. Claimant was notified of that determination by mail dated November 15, 1965, and appealed on November 20, 1965.

Findings of Fact: Claimant became employed with employer (—020817) in 1961 or 1962. Subsequent to undertaking this employment, appellant became a member of United Steel Workers of America, Local 5571, AFL-CIO. This organization was the collective bargaining agent for workers with employer (—020817). On February 2, 1963, the union and the employer entered into a collective bargaining agreement that was effective until January 30, 1965. Prior to January 30, 1965, the union and the employer negotiated with respect to a new collective bargaining agreement. Prior to January 30, 1965, impasse was reached in such negotiations. On January 30, 1965, union [fol. 31] members held an election and voted to strike the employer. This dispute concerned terms or conditions of continued employment with the employer for workers. At 12:01 a.m. on January 31, 1965, a picket line was established at the premises of employer (—020817) at which claimant was employed. Appellant and other workers of her grade or class withheld their services from the employer or performed active picket duty or both. All workers of the employer did not withhold their services when this labor controversy began and so the employer continued operations. On March 30, 1965, a union representative contacted the employer's plant manager and offered to return the striking workers unconditionally to their jobs. On April 5, 1965, an employer representative informed the union's staff representative that the employer would take some of the striking workers back but not others. On April 5, 1965, the picket line was removed from the employer's premises. On April 6, 1965, the employer began processing those striking workers who were being

taken back to work, back to their jobs. Appellant was not one of the striking workers the employer would not permit to return. She was returned to work unconditionally. The employer refused to permit approximately fifty workers to return to their jobs. On April 6, 1965, through the union, these workers filed charges with the National Labor Relations Board regarding their not being returned to work. The relief sought in these charges included the workers being returned to their jobs and paid back pay for time which they had lost from work. Appellant went back to work on April 14, 1965. She worked until May 16, 1965, and then was laid off by the employer for "slow production." On June 17, 1965, claimant filed charges with the National Labor Relations Board alleging that the employer had discriminated against her by separating her from her job. The relief appellant sought with these charges included being reinstated on her job and paid back pay for time which she had lost from work. On October 5, 1965, the employer, voluntarily, recalled claimant to work. After October 5, 1965, claimant worked until December 17, when the employer again separated her from her job. Claimant was separated from her job on December 17, 1965, because of a plant shutdown, customary with the employer, for the Christmas and New Year's holidays. Appellant will be recalled to work when the employer's plant resumes operations. As of the date of the hearing, December 22, 1965, the charges which claimant had filed with the National Labor Relations Board against the employer on June 17, 1965, were unresolved and pending, as were the charges filed on April 6, 1965, by those workers the employer would not return to their jobs.

Claimant's unemployment for the period beginning January 31, 1965, to April 14, 1965, was due to a labor dispute [fol. 32] in active progress at the premises at which she was last employed, and she is disqualified for benefits for such period. Claimant is eligible for benefits without disqualification for all periods, for which she claimed benefits, from May 16, 1965, to June 17, 1965. The employer's

experience rating account is chargeable with any benefits which might be paid in connection with this claim for the period beginning May 16, 1965, to June 17, 1965. Claimant's unemployment from June 17, 1965, to October 5, 1965, was due to a labor dispute in active progress at the premises at which she was last employed, and she is disqualified from receiving benefits for such period. Claimant is eligible for benefits without disqualification for all periods for which she claimed benefits for the period beginning December 17, 1965, and so long as her unemployment after such date is due to a plant shutdown. The employer's experience rating account is chargeable with any benefits which might be paid in connection with this claim for the period beginning December 17, 1965, and thereafter for any benefits paid claimant as a result of her unemployment being due to the employer's plant shutdown on December 17, 1965.

Reasons for Decision: The Florida Unemployment Compensation Law provides:

"443.06 Disqualification for benefits—An individual shall be disqualified for benefits:

"(4) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the Commission that:

"(a) He is not participating in or financing, or directly interested in the labor dispute which is in active progress; provided, however, that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this section; and

"(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of

whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection be deemed to be a separate factory, establishment or other premises."

[fol. 33] Here, it has been shown that claimant's unemployment from January 31, 1965, to April 14, 1965, was due to a labor dispute in active progress at the premises at which she was last employed. It has also been shown that she actively participated in such dispute by performing active picket duty or withholding her services from the employer, or both. In view of these factors, appellant is properly subject to disqualification for benefits under the labor dispute provisions of the Law for the period beginning January 31, 1965, to April 14, 1965.

The testimony presented in this instance shows that on June 17, 1965, appellant filed charges with the National Labor Relations Board against the employer because of her separation on May 16, 1965, seeking, among other things, reinstatement on her job and back pay for time which she had lost from work. It has further been shown that these charges were unresolved and pending when claimant was recalled to work by the employer, voluntarily, on October 5, 1965. These charges being filed and being unresolved and pending as of the date appellant returned to work constitute a labor dispute in active progress at the premises at which she was last employed between claimant and the employer. Consequently, here, it should be deemed that any unemployment appellant experienced during the period beginning June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she participated in such dispute. Therefore, it should be held that appellant is dis-

qualified for benefits for the period beginning June 17, 1965, to October 5, 1965.

As appellant was separated from her job on May 16, 1965, due to "slow production" and did not dispute such separation until June 17, 1965, it should be held that she is qualified for benefits for all periods for which she filed claims for the period beginning May 16, 1965, to June 17, 1965. Granted, there was a labor dispute in active progress at the employer's premises when claimant was separated from her job on May 16, 1965, (such dispute being the labor controversy manifested by the charges with the National Labor Relations Board filed on April 6, 1965, by those workers who were not returned to their jobs and those charges being unresolved and pending when claimant's employment was terminated on May 16, 1965). But appellant's becoming unemployed on May 16, 1965, was not due to this dispute.

Although the charges filed with the National Labor Relations Board on June 17, 1965, by claimant were unresolved and pending when she was separated from her job on December 17, 1965, since she was separated from her job on this occasion due to a plant shutdown and will be recalled to work when the plant begins operations after the [fol. 34] shutdown, it should not be deemed that her unemployment after December 17, 1965, and so long as her unemployment is due to the plant shutdown, is due a labor dispute in active progress.

Decision: The determination of the Claims Examiner is hereby modified so as to hold as follows: claimant is disqualified for benefits, because unemployed due to a labor dispute in active progress at the premises at which she is or was last employed, for the period beginning January 31, 1965, to April 14, 1965; claimant is eligible for benefits without disqualification for all periods, for which she claimed benefits, from May 14, 1965, to June 17, 1965; the experience rating account of the employer is chargeable with any benefits which might be paid in connection with

this claim for the period beginning May 14, 1965, to June 17, 1965; claimant's unemployment from June 17, 1965, to October 5, 1965, was due to a labor dispute in active progress at the premises at which she was last employed, and she is disqualified from receiving benefits for such period; claimant is eligible for benefits without disqualification, for all periods for which she claimed benefits, for the period beginning December 17, 1965, and so long as her unemployment after such date is due to plant shutdown; the employer's experience rating account is chargeable with any benefits which might be paid in connection with this claim for the period beginning December 17, 1965, and thereafter for any benefits paid claimant as a result of her unemployment due to the employer's plant being shut down as of December 17, 1965; and, as modified, the Claims Examiner's determination is affirmed.

James R. Parks, Appeals Referee.

Date Mailed Claimant
and Employer: Jan. 14, 1966.

[fol. 35]

CLAIMANT'S APPEAL TO BOARD OF REVIEW

(Letterhead of Rutledge and Milledge, Miami, Florida.)
[Stamp—Received Jan. 20, 1966—Florida Industrial Commission, Board of Review]

January 17, 1966

Florida Industrial Commission
Appeals Office
1350 N.W. 12th Avenue
Miami, Florida

Attention: Mr. Ruffo

Dear Mr. Ruffo:

Pursuant to our telephone conversation of January 17, 1966, this is to inform you of the application for leave

to appeal to the Board of Review of the Florida Industrial Commission under Florida Statute 443.07(4)(c) by Minnie E. Nash, from decision number 65-4494-U rendered on January 14, 1965, by Appeals Referee James R. Parks.

A Photocopy of the Notice of Decision of Appeals Referee is enclosed herewith, for your convenience.

Please advise whether any additional information is necessary for this application.

Sincerely,

Rutledge & Milledge, Richard L. Horn,

RLH/pm

Enclosure

[fol. 36]

CLAIMANT'S ADDITIONAL GROUNDS FOR APPEAL

(Letterhead of Rutledge and Milledge, Miami, Florida.)
[Stamp—Received Jan. 21, 1966—Florida Industrial Commission, Board of Review]

January 18, 1966

Florida Industrial Commission
Appeals Office
1350 N.W. 12th Avenue
Miami, Florida

Attention: Mr. Ruffo

Dear Mr. Ruffo:

Pursuant to our telephone conversation of Tuesday, January 18, 1966, the following grounds are to be included in the application for leave to appeal to the Board of Review of Mrs. Minnie Nash:

> The decisions rendered by the Claims Examiner and the Appeals Referee are based upon a construction

of Florida Statute section 443.06(4) which renders said statute unconstitutional as applied to appellant under the Privileges and Immunities Clause, Amendment 14, Section 1, United States Constitution, and the Supremacy Clause, Article 6, Clause 2, United States Constitution;

Said decisions are further defective for the reason that appellant's unemployment was not "due to a labor dispute in active progress" as required by Florida Statutes (1963), Section 443.06(4).

I would appreciate your sending me a copy of the final application form when it is sent to Tallahassee.

Sincerely,

Richard L. Horn.

RLH/pm

[fol. 37]

ACKNOWLEDGMENT OF CLAIMANT'S APPEAL

(Letterhead of Florida Industrial Commission, Unemployment Compensation Board of Review, Tallahassee, Florida)

January 24, 1966

Minnie E. Nash
3361 N. W. 67th Street
Miami, Florida

Re: Referee's Decision Docket No. 65-4494U

Claimant—Appellant
Name:
S.S. No.: 409-24-6136

Employer
Name: Stanley Building Specialties
and
The Stanley Works

Receipt is acknowledged of the appeal filed in the above case. Docket No. 66-38 has been assigned to this case. The recorded testimony taken at the hearing, together with the entire file, will be sent to the Board of Review.

The Board will consider the case upon the record. In some instances, the Board may deem it necessary to take additional testimony before making its decision. If so, a hearing will be scheduled and all interested parties will be notified seven days prior to the date of the hearing.

If any of the interested parties desire to submit a written brief as to their contentions, they may do so by addressing same to Board of Review, Florida Industrial Commission, Unemployment Compensation Division, Caldwell Building,

Tallahassee, Florida. All communications are to be identified by the docket number shown above.

Yours very truly,

Florida Unemployment Compensation
Board of Review

By: Lillie O. Hall, Secretary.

cc: FSES—Miami (14-0-13)

Claimant's Attorney
(Fla. BR-3A-Rev. 6/1/65)

Employer's Attorney
Union

[fol. 38]

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
TALLAHASSEE, FLORIDA 32304

Docket No. 66-38
S.S. No. 409-24-6136

In the Matter of:

Minnie E. Nash, Claimant
3361 N.W. 67 Street, Miami, Florida and
Stanley Building Specialties, Employer
1890 N.E. 146 Street, No. Miami, Florida

NOTICE OF REVIEW HEARING

The decision of the Appeals Referee in the above-styled matter is scheduled for review by the Board of Review on February 16, 1966 at 2:00 P.M. in the Conference Room,

Caldwell Building, located at Tallahassee, Florida, an appeal from such decision having been filed by the Claimant.

A decision by the Board of Review will be rendered upon the record, including the testimony presented at the hearing before the Appeals Referee. It will not be necessary for you to appear in person. However, you may submit a written brief or a statement in the form of a letter, setting forth your contentions and arguments, if you so desire. Any correspondence in reference to this review should be addressed to: *Mrs. Lillie O. Hall, Secretary, Board of Review, Caldwell Building, Tallahassee, Florida.*

Date: February 9, 1966

Board of Review, By J. D. Wright, Jr., Chairman.

Copies Mailed to:

Claimant

Employer (2 addresses)

Claimant's Attorney

Employer's Attorney

Union Local Office—Miami

FSES—Miami (14-0-13)

(Fla. BR-4) (Rev. 6/1/65)

[fol. 39]

NOTICE OF DECISION OF BOARD OF REVIEW

(See opposite) ☞

FLORIDA INDUSTRIAL COMMISSION

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
Tallahassee, Florida 32304

NOTICE OF DECISION OF BOARD OF REVIEW

Claimant:

Minnie E. Nash
3361 N. W. 67 Street
Miami, Florida

Social Security No. 409-24-6136

Decision No. 66-38

We enclose a copy of the decision of the Board of Review on this case

This decision will become final unless a proceeding for judicial review is initiated pursuant to Section 443.07(4)(e) of Chapter 443, Florida Statutes, 1957, known as the Florida Unemployment Compensation Law.

A proceeding for judicial review is initiated by filing in the District Court of Appeals a petition for writ of certiorari. Such petition must be filed in accordance with the rules of such court. These rules require that the same be filed within sixty days after the mailing date of this notice.

The Florida Industrial Commission and any other party to the proceeding before the Board of Review shall be made respondents to any such proceeding for judicial review.

Employer: No. -020817

Stanley Building Specialties
1890 N. E. 146 Street
North Miami, Florida

and:

The Stanley Works
195 Lake Street
New Britain, Connecticut 06052

February 22, 1966
Date of mailing this decision

BOARD OF REVIEW

J. D. Wright Jr.
Chairman

Other copies mailed to:
FSES - Miami (14-0-13)
Benefit Dept.
Claimant's Attorney
Employer's Attorney
Union Local Office - Miami
Field Deputy L. Liebman
General Counsel
Chief Field Deputy
Status Section

RECEIVED
FEB 28 1966
BENEFIT DEPARTMENT
Unemployment Compensation
Division

Form Fla. BR-8 (Rev. 5-59)

237

[fol. 40]

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
TALLAHASSEE, FLORIDA 32304

Board of Review Decision No. 66-38

Re: Referee's Decision Docket
No. 65-4494U

In the Matter of:

Social Security Account
No. 409-24-6136
Claimant-Appellant

Employer No. —020817

DECISION—Issued February 22, 1966

After due notice to the parties, this cause came on for final administrative disposition by the Board of Review at Tallahassee, Florida, on February 16, 1966, and was reviewed upon the record.

The decision of the Appeals Referee is affirmed.

Florida Unemployment Compensation Board of Review, J. D. Wright, Jr., Chairman, Walter L. Lightsey, Member, Frank M. Nelson, Jr., Member.

Date Mailed to the Parties: February 22, 1966

(Form Fla. BR-7)

[fol. 41]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

66-330

MINNIE E. NASH, Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS, and STANLEY BUILDING SPECIALTIES, Respondents.

PETITION FOR WRIT OF CERTIORARI—Filed April 20, 1966

To the District Court of Appeal, Third District:

The Petitioner, Minnie E. Nash, presents this, her petition for a Writ of Certiorari, to the Florida Industrial Commission, and states:

1. The Petitioner, Minnie E. Nash, Social Security No. 409-24-6136, seeks to have reviewed Decision No. 66-38 of the Unemployment Compensation Board of Review, Florida Industrial Commission, dated February 22, 1966, in which the Respondents, The Stanley Works and Stanley Building Specialties, appeared as Employers.

2. This petition is presented under and pursuant to Sec. 443.07(4)(c) and Sec. 443.07(4)(e), Florida Statutes.

3. The Petitioner was determined to be disqualified for all unemployment compensation benefits which she had previously received during 1965 in a redetermination rendered by a Claims Examiner on November 15, 1965, based upon the provisions of Sec. 443.06(4)(a)(b), Florida Statutes.

4. The said redetermination was affirmed in part and reversed in part by an Appeals Referee, upon a timely ap-

[File endorsement omitted]

[fol. 42] peal, and after a hearing held in Miami, Florida, in a decision dated January 14, 1966.

5. The Board of Review, upon a timely application by the Petitioner herein for review of the decision of the Appeals Referee, affirmed the Appeals Referee in the decision sought to be reviewed herein, dated February 22, 1966.

6. This petition is accompanied by a Motion to Require Preparation of Transcript of Record and for Extension of Time for Filing of Brief.

7. Because of the reasons to be fully set forth in the Brief of Petitioner, it is believed that the decision sought to be reviewed herein is erroneous and in conflict with the essential requirements of the Constitution of the United States, Privileges and Immunities Clause, Amendment XIV, Section 1, and Supremacy Clause, Article 6, Clause 2, and the laws of the State of Florida, on the grounds that:

> The determination that petitioner was disqualified for unemployment compensation benefits solely for the reason that petitioner had, subsequent to her unemployment, filed an unfair labor practice charge with the National Labor Relations Board, embodies a construction of F.S. §443.06(4)(a)(b) which renders said statute unconstitutional as applied to petitioner under the aforesaid provisions of the Constitution of the United States, and is further defective as an erroneous construction of said statute.

Wherefore, the Petitioner petitions the Court to grant a Writ of Certiorari and enter its order quashing the decision and order sought to be reviewed, awarding attorneys' [fol. 43] fees to the Petitioner, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

Rutledge and Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, 111 Northeast First Street, Miami, Florida 33132, Richard L. Horn.

Certificate of Service (omitted in printing).

[fol. 44]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

66-330

MINNIE E. NASH, Petitioner,

—vs.—

FLORIDA INDUSTRIAL COMMISSION, and THE STANLEY WORKS, Respondents.

MOTION FOR ATTORNEYS' FEES—Filed April 20, 1966

Pursuant to Rule 3.16(e) the petitioner respectfully moves the Court to assess attorneys' fees for services herein in her favor, and against the respondent, Florida Industrial Commission, as provided by Florida Statute § 443.16(2)(b).

Respectfully submitted,

Rutledge & Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, 111 N. E. 1st Street, Miami, Florida, Richard L. Horn.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 45]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

66-330

[Title omitted]

[Handwritten notation—Grant—N. H.]

MOTION TO REQUIRE PREPARATION OF TRANSCRIPTS OF RECORD AND FOR EXTENSION OF TIME FOR FILING OF BRIEF OF PETITIONER—Filed April 20, 1966

The petitioner, Minnie E. Nash, respectfully moves the Court for an order requiring the Respondent Florida Industrial Commission to prepare and to provide the petitioner and the Court with an appropriate number of transcripts of the record of the proceedings in this cause, and shows in support of this motion as follows:

1. The petitioner is unable to accompany the petition for writ of certiorari herein with a certified transcript of record, since all of the record herein has been retained by the Florida Industrial Commission. The petitioner does not possess a transcript of the record; to her knowledge, none has been prepared. Only the respondent, Florida Industrial Commission, is able to prepare and provide transcripts.

2. It is believed that the Florida Industrial Commission is able, willing and prepared to provide the parties [fol. 46] and the Court with copies of the transcript of the record within twenty (20) days of the order requiring it to do so.

The petitioner, Minnie E. Nash, further respectfully moves the Court for an order granting her twenty (20)

[File endorsement omitted]

days from the service of the transcript by the Florida Industrial Commission upon her, to file the Brief of Petitioner, and shows in support of this motion, as follows:

1. The Brief of Petitioner cannot be properly prepared without a transcript of the record herein.

2. The petitioner does not possess such a transcript, for the reasons stated herein.

Wherefore, the petitioner respectfully moves the Court for an order requiring the respondent Florida Industrial Commission to prepare, file and serve transcripts of the record herein within twenty (20) days of the Court's order, and granting the petitioner twenty (20) days after the service of the transcript upon her within which to file the Brief of Petitioner.

Respectfully submitted,

Rutledge and Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, 111 Northeast First Street, Miami, Florida 33132, Richard L. Horn.

Certificate of Service (omitted in printing).

[fol. 48]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

ORDER—April 20, 1966

Upon consideration of petitioner's motion to require preparation of transcript, it is ordered that the respondent Commission prepare and file the transcript of proceedings

in this cause in the usual manner, serving petitioner's counsel with a copy thereof and that the time for filing petitioner's brief is extended for a period of twenty (20) days from the date of filing of the transcript in this court.

cc: Rutledge & Milledge, Patrick H. Mears, Lawrence Kanzer, Fowler, White, Gillen, Humkey & Trenam.

/m

[fol. 49]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

PETITIONER'S REQUEST FOR ORAL ARGUMENT—
Filed May 24, 1966

The Petitioner herein respectfully requests oral argument in the above-styled cause.

Rutledge and Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, 111 Northeast First Street, Miami, Florida 33132, Richard L. Horn.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 50]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

FLORIDA INDUSTRIAL COMMISSION, RESPONDENT'S REQUEST FOR ORAL ARGUMENT—Filed June 8, 1966

Comes Now Respondent, Florida Industrial Commission, and through its undersigned attorney, respectfully requests that this Court grant it oral argument in this cause. Respondent also requests that if at all possible oral argument date be set on some day other than the period of July 5 through July 15, 1966, which is the vacation period for Respondent's undersigned attorney.

Respectfully submitted this 8th day of June, 1966.

Patrick H. Mears, Caldwell Building, Tallahassee, Florida and Lawrence Kanzer, Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, Florida Industrial Commission, Lawrence Kanzer, of Counsel.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 51]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

[Handwritten notations—Grant—N. H.—due 6/13—Cards mailed 6-10-66 JD]

STIPULATION RE FILING OF BRIEFS—June 9, 1966

Comes Now the Petitioner, Minnie E. Nash, and the Respondents, The Stanley Works and Stanley Building Specialties, by and through their undersigned attorneys, and stipulate that Respondents, The Stanley Works and Stanley Building Specialties, may have to and including June 24, 1966, in which to file their Brief and that Petitioner may have ten (10) days therefrom in which to file its Reply Brief.

Stipulated and agreed this 9th day of June, 1966.

Rutledge and Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, 111 Northeast First Street, Miami, Florida 33132, By Richard L. Horn;

Florida Industrial Commission, Attorneys for Respondent, Room 161, State Office Building, 1350 Northwest 12th Avenue, Miami, Florida, By Lawrence Kanzer;

Fowler, White, Gillen, Humkey & Trenam, Attorneys for Respondent, 501 City National Bank Building, Miami, Florida 33130, By W. Reynolds Allen.

[File endorsement omitted]

[fol. 52]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

THE STANLEY WORKS AND STANLEY BUILDING SPECIALTIES, RESPONDENTS' REQUEST FOR ORAL ARGUMENT—Filed June 24, 1966

Come Now Respondents, The Stanley Works, and Stanley Building Specialties by and through their undersigned counsel, and respectfully requests this Court grant them oral argument in this cause.

Respectfully submitted this 24th day of June, 1966.

Fowler, White, Gillen, Humkey & Trenam, 501 City National Bank Building, Miami, Florida 33130,
By: W. Reynolds Allen.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 53]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

ORDER—October 11, 1966

Counsel for petitioner having filed in this cause a motion for attorneys' fees, and same having been considered by the court which determined the cause, it is ordered that said motion is hereby denied.

cc: Rutledge & Milledge, Lawrence Kanzer, Patrick H. Mears, Fowler, White, Gillen, Humkey & Trenam.

/h

[fol. 54]

[Stamp—Not final until time expires to file rehearing petition and, if filed, disposed of.]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

Case No. 66-330

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—October 11, 1966

This cause having heretofore been submitted to the court on petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Board of Review of the Florida Industrial Commission, Unemployment Compensation Division, in said cause, bearing date of

February 22, 1966, and the record having been considered, it is ordered that said petition be and the same is hereby denied.

Clerk District Court of Appeal, Third District.

cc: Rutledge & Milledge, Patrick H. Mears, Lawrence Kanzer, Fowler, White, Gillen, Humkey & Trenam, Mandate file.

/h

[fol. 55]

(Letterhead of District Court of Appeal, Third District, Miami, Florida 33136)

Oct 27, 1966

Rutledge & Milledge
Attorneys at Law
601 Flagler Federal Bldg.
Miami, Florida

Re: Nash vs. Fla. Industrial Comm.
Case No. 66-330

This is to advise you that the final order in the above styled cause was issued this date.

Very truly yours,

/s/ William P. Carter
Clerk District Court of
Appeal, Third District

cc: Patrick H. Mears; Lawrence Kanzer;
Fowler, White, Gillen, Humkey & Trenam

card to West

/h

[fol. 56] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 57]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1966

MINNIE E. NASH, Petitioner,

vs.

FLORIDA INDUSTRIAL COMMISSION, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 10, 1967

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 8th, 1967.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 10th day of January, 1967.

[fol. 58]

SUPREME COURT OF THE UNITED STATES

No. 1032—October Term, 1966

MINNIE E. NASH, Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION, et al.

ORDER ALLOWING CERTIORARI—April 10, 1967

The petition herein for a writ of certiorari to the District Court of Appeal of the State of Florida, Third District, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 6 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966 7

No. ~~1032~~ 48

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Neal Rutledge
Allan Milledge
Richard L. Horn
Counsel for Petitioner
601 Flagler Federal Building
Miami, Florida

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the final judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on October 11, 1966.

CITATIONS TO OPINIONS BELOW

The decision of the Appeals Referee, Florida Industrial Commission, Unemployment Compensation Appeal

Tribunal is unreported, appears in the Record at pp. 30-34, and is printed in Appendix C hereto, *infra*. The decision of the Florida Industrial Commission, Unemployment Compensation Board of Review is unreported, appears in the Record at p. 40, and is printed in Appendix B hereto, *infra*.

The District Court of Appeal, Third District of Florida, did not render an opinion; its final judgment here involved denying Petition for a Writ of Certiorari is officially reported at 191 So.2d 99, appears in the Record at p. 54, and is printed in Appendix A hereto, *infra*.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on October 11, 1966, R. 54; Appendix A hereto, *infra*. An Order Extending Time to File Petition for Writ of Certiorari was entered by Mr. Justice Black on January 10, 1967, extending Petitioner's time for filing the present Petition to and including February 8, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) since a right, privilege and immunity was claimed under the Constitution and Statutes of the United States.

QUESTIONS PRESENTED

1. Whether, consistent with the privileges and immunities clause and supremacy clause of the United States Constitution, a state may abridge the privilege or immunity of a citizen of the United States to inform the United States government of a violation of its laws,

by depriving a citizen of unemployment compensation benefits solely upon the ground that the citizen has filed an unfair labor practice charge with the National Labor Relations Board against her employer?

2. Under Article VI, clause 2, and the 14th Amendment, section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits solely because that citizen has filed an unfair labor practice charge with the National Labor Relations Board under the National Labor Relations Act 29 U.S.C. 141, et seq., such disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?

3. Where a strike ends, and a striking employee is reinstated to her employment and such employee is thereafter laid off by the employer for lack of work and is granted state unemployment benefits, and where thereafter the employee's union within six months after the lay-off files charges alleging that the lay-off was illegal and discriminatory under the National Labor Relations Act, may the state, under Article VI, clause 2, and the 14th Amendment, section 1, then disqualify the employee from unemployment benefits during the pendency of such charges before the National Labor Relations Board?

4. Whether the right to file charges with the National Labor Relations Board is protected from state abridgement by the privileges and immunities clause and supremacy clause, United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

U. S. Constitution, Amendment XIV, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (1965) Section 443.06(4):

"443.06 Disqualification for benefits—An individual shall be disqualified for benefits:

. . . . .

(4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that:

(a) He is not participating in or financing, or directly interested in the labor dispute which is in active progress; provided, however, that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this section; and

(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection be deemed to be a separate factory, establishment or other premises.

. . . . ."

STATEMENT OF THE CASE

Petitioner Minnie E. Nash is today and has been at all times material to this case (when employed) an employee of the Respondent Stanley Building Specialties Company, a division of Respondent Stanley Works (hereinafter referred to as Stanley) in Miami, Florida. The stipulated facts and undisputed testimony reveal the following chronology:

Petitioner was originally employed by Stanley some time in 1961 or 1962 (R. 13). She was a permanent employee. At some time subsequent to her employment, Petitioner joined the United Steelworkers of America (hereinafter referred to as the union) which was the certified collective bargaining representative of Stanley's employees (R. 11).

On January 31, 1965, which was the expiration date of the collective bargaining agreement which had previously been in effect between Stanley and the union, the union took strike action against the employer (R. 11). Picket lines were established in which Petitioner participated, and Petitioner did not work for Stanley during the period of the continuation of the strike and picketing (R. 11, 13, 14). During the period of the strike Stanley continued operations.

On or about March 30, 1965, the union offered to return the striking workers to their jobs unconditionally, and on April 5, Stanley agreed to take some of the striking workers back unconditionally. Petitioner was among the workers accepted unconditionally for return (R. 11). On April 5, 1965, the picket lines were removed and the

employer began processing the returnees. Petitioner actually resumed her active permanent employment with Stanley on April 14, 1965 (R. 11, 14).

Petitioner was laid off from her permanent employment with the Respondent because of "slow production" on May 14, 1965 (R. 1, 12). On May 17, 1965, Petitioner applied for unemployment compensation benefits under Florida Statutes, Chapter 443, and began receiving benefits effective May 16, 1965, approximately three weeks later (R. 1, 17).

On June 17, 1965, Petitioner's union, the United Steelworkers of America, on Petitioner's behalf, filed unfair labor practice charges with the National Labor Relations Board, pursuant to 29 U.S.C. 160, alleging that Petitioner's layoff had been discriminatory and was motivated by bias engendered by Petitioner's previous union activities in violation of 29 U.S.C. 158(a)(1), and 158(a)(3). (R. 11, 13, 14).

Petitioner continued receiving unemployment compensation benefits until October 5, 1965, when she was returned to work voluntarily by Stanley (R. 15, 20).

In a Redeterminaiton rendered by a Claims Examiner on November 15, 1965, the Respondent, Florida Industrial Commission, ruled that Petitioner was disqualified under Florida Statute §443.06(4) from receipt of any benefits:

> " . . . beginning January 31, 1965, and for the duration of your unemployment which is due to

> a labor dispute at the factory or other premises of the Stanley Works." (R. 3)

The Claims Examiner relied upon Florida Statute §443.06(4), which provides, in pertinent part, that benefits may not be paid a claimant,

> "For any week with respect to which the Commission finds that his total or partial unemployment is *due to a labor dispute in active progress* which exists at the factory, establishment, or other premises at which he is or was last employed. . . ." (Emphasis added.)

Petitioner filed a timely appeal from the Claims Examiner's Redetermination (R. 4).

After due notice to all parties, a hearing was held before an Appeals Referee on December 22, 1965, in Miami, Florida, at which Petitioner, a representative of the employer, and a field deputy of the Respondent Florida Industrial Commission testified. Petitioner and Stanley were represented by counsel and Petitioner raised her claim of federal constitutional privileges and immunities as preventing the application of Florida Statute §443.06 (4) to her, in argument of counsel, at this earliest adversary administrative level (R. 14).

The Appeals Referee, in a decision rendered on January 14, 1965, affirmed in part and reversed in part the Redetermination of the Claims Examiner (R. 30). The Referee ruled that Petitioner was disqualified from receiving benefits for the period of her voluntary strike activities from January 31, 1965, until April 14, 1965.

This finding was mere surplusage for Petitioner had neither applied for nor received any benefits during that period.

The Referee then ruled that Petitioner was *eligible* for unemployment compensation benefits for the period May 16, 1965, through June 17, 1965, finding that her unemployment during this period was *not* due to a labor dispute in active progress under the terms of Florida Statute §443.06(4) (R. 31). However, the Referee went on to find that Petitioner *was disqualified* from receipt of any benefits for the period June 17, 1965-October 5, 1965, based upon the following reasoning:

> "The testimony presented in this instance shows that on June 17, 1965, appellant filed charges with the National Labor Relations Board against the employer because of her separation on May 16, 1965, seeking, among other things, reinstatement on her job and back pay for time which she had lost from work. It has further been shown that these charges were unresolved and pending when claimant was recalled to work by the employer, voluntarily, on October 5, 1965. These charges being filed and being unresolved and pending as of the date appellant returned to work constitute a labor dispute in active progress at the premises at which she was last employed between claimant and the employer. *Consequently, here it should be deemed that any unemployment appellant experienced during the period June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she par-*

ticipated in such dispute." (R. 33) (Emphasis added)

Petitioner timely filed an application for leave to appeal to the Unemployment Compensation Board of Review of the Florida Industrial Commission under Florida Statute §443.07(4)(4). (R. 35). Included in the grounds for appeal was Petitioner's federal constitutional claim (R. 36).

On February 16, 1966, a review hearing was held by the Unemployment Compensation Board of Review in Tallahassee, Florida, and on February 22, 1966, the Board of Review rendered its decision affirming the Appeals Referee without opinion. (R. 40)

Thereafter, Petitioner timely filed her petition for certiorari directed to the Florida Industrial Commission, in the District Court of Appeal of Florida, Third District, pursuant to Florida Statute §443.07(4)(3).

In that Court, the highest state court in which Petitioner could seek the enforcement of her federal constitutional rights,[1] Petitioner raised the issue here presented in the following manner:

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[1]The District Court of Appeal of Florida, expressly by Florida Statute Section 443.07(4)(e) has exclusive jurisdiction to entertain petitions for certiorari to review the determinations of the Respondent Florida Industrial Commission Unemployment Compensation Board of Review. Petitioner claimed or specially set up her privileges and immunities under the Fourteenth Amendment and Supremacy Clause, United States Constitution, in the manner above-quoted to that Court.

The District Court of Appeal entered a *per curiam* denial of Petitioner's petition for certiorari, thus precluding further State Court review under the pertinent provisions of the State Constitution and Florida Appellate Rules. Article V, Section 4, Florida Constitution; Florida Appellate Rule 2.1(b); *Armstrong v. City of Tampa*, 106 So.2d 407 (Fla. Sup.Ct.1958); *Miami Herald Publishing Co., v. Brauti-*

"POINTS INVOLVED"

"1. Whether, consistent with the privileges and immunities clause and supremacy clause of the United States Constitution, a state may abridge the privilege of a citizen of the United States to inform the United States government of a violation of its laws, by depriving a citizen of unemployment compensation benefits solely upon the ground that the citizen has so informed the government by filing an unfair labor practice charge against her employer?" Brief of Petitioner in Florida District Court of Appeal, Third District, p. 6..

The District Court of Appeal on October 11, 1966, denied the petition for a writ of certiorari without opinion. (R. 41)

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner relies upon the following reasons why the petition for writ of certiorari should be granted in this case:

Important and substantial issues of federal constitu-

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gam, 121 So.2d 431 (Fla. Sup.Ct.1960); 127 So.2d 718 (3rd D.C.A. Fla. 1961) *cert. denied*, (1962) 369 U.S. 821; *Page v. State*, 113 So.2d 557 (Fla. Sup.Ct.1959).

This state practice is identical to the situation in *Adderley v. Florida*, (1966) ——U.S.——, 87 S.Ct. 242, where petitioners claimed rights under the Fourteenth Amendment as precluding their conviction under a trespass statute, and the District Court of Appeal of Florida, First District, entered a *per curiam* affirmance of the convictions, from which denial a petition for certiorari was granted by this Court.

tional law are here presented, involving the relationship between the national labor policy as embodied in the National Labor Relations Act, 29 U.S.C. 141 et seq. and the State of Florida's policy of disqualifying from state unemployment benefits all persons who file unfair labor practice charges pursuant to the Federal Act, in the light of the controlling provisions of the Supremacy Clause and Fourteenth Amendment to the United States Constitution.

Petitioner submits that the State of Florida, in so implementing the provisions of its State Unemployment Compensation Act, Chapter 443, Florida Statutes 1965, particularly Section 443.06(4) thereof, has effectively abridged her privileges and immunities as a citizen of the United States, contrary to the Fourteenth Amendment and in conflict with controlling principles established by this Court.

The record here demonstrates in stark outline that Petitioner has been disqualified from receiving unemployment compensation benefits under Florida Statutes §443.06(4), for the sole reason that, subsequent to her unemployment, she informed the United States Government of a violation of its laws, i.e., filed unfair labor practice charges with the National Labor Relations Board.

The decision of the Appeals Referee, in allowing Petitioner's claim for benefits from the date of her layoff (May 16, 1965) to the date unfair labor practice charges were filed (June 17, 1965), then revoking benefits as of the date of filing charges, shows beyond any doubt that the sole reason for Petitioner's disqualification was the

filing and pendency of her charges with the National Labor Relations Board.[2]

The stipulated facts reveal that, before the NLRB and in the present case, the employer respondents have consistently taken the position that Petitioner's layoff on May 16, 1965, was based upon purely economic considerations (R. 12). There would be no question then that but for the filing of charges Petitioner would have been eligible for benefits for the full period of her unemployment. Such a *per se* disqualification cannot stand, consistent with Petitioner's federal constitutional rights.

The Privileges and Immunities Clause, contained in the Fourteenth Amendment to the United States Constitution, although little used in the great Constitutional controversies of the last century, maintains its potency in several clearly defined areas. Petitioner submits that the present case falls within one of these areas.

The Clause was early held to protect from state encroachment, those privileges and immunities of citizens of the United States " . . . which owe their existence to the Federal Government, its National character, its Constitution, or its laws." *Slaughter-House Cases* (1873) 83 U.S. 36, 79.

Among the rights subsequently enumerated within these narrowly definited limits is *the right to inform the*

[2]Another decision of the District Court of Appeal below, *Labinsky v. Florida Industrial Commission*, 167 So.2d 620 (Fla. 1964), demonstrates that where no unfair labor practice charges have been filed, an employee who has previously been disqualified from benefits under the "labor dispute" proviso, becomes qualified when he resumes permanent employment, as Petitioner did from April 14, 1965 to May 16, 1965.

United States authorities of violations of its laws. In Re Quarles, (1895) 158 U.S. 532.

In the *Quarles* case, *supra,* this Court held:

> "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. *Logan v. United States,* 144 U.S. 294. Both are, within the concise definition of the Chief Justice in an earlier case, 'privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.' *Ex Parte Kemmler,* 136 U.S. 436, 448." 158 U.S. at 536.

The filing of an unfair labor practice charge with the National Labor Relations Board is nothing more nor less than informing an agency of the United States Government of a violation of federal law. The NLRB is particularly empowered to investigate and remedy these violations. *Labor Management Relations* Act, 29 U.S.C. §160-161.

When Petitioner, through her collective bargaining representative, filed these charges, she in her capacity as a citizen of the United States was exercising a right which owes its existence to federal law. The remedies sought

are uniquely within the province of the federal government's power to regulate interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.* (1939) 301 U.S. 1.

As a direct result of exercising this constitutionally protected right, indeed, as the automatic result of the exercise of this right, Petitioner, under the State of Florida's view, thereupon became disqualified for benefits to which she unquestionably would otherwise have been entitled.

Clearly the state may not claim that unemployment compensation benefits are merely a "privilege" rather than a "right," and that the state may condition access to the "privilege" as it sees fit.[3] In *Sherbert v. Verner*, (1963) 374 U.S. 398, this Court laid to rest such contentions with regard to unemployment compensation benefits, in holding that constitutional protections may not ". . . be infringed by the denial of or placing of conditions upon a benefit or privilege. . . ." 374 U.S. at 404. (See also

[3]Respondent Employers urged such an "election" or "condition" theory upon the District Court of Appeal below contending that the State could, consistent with the Constitution " . . . . put petitioner to an election of available remedies and tribunals . . . ." Brief of Respondent Employer, p. 18.

A second ground urged upon the Court below was that petitioner's charges filed with the NLRB were not reports to the Government of a violation of the NLRA but merely ". . . an assertion that an employee, union or other party *thinks* an employer has violated the National Labor Relations Act. It is in no wise a report to the Government of a violation of said Act." Brief for Respondent Employers, p. 16 (emphasis in original). Respondent employers therefore urged that no protection should be accorded to such reports until the NLRB and an appropriate Circuit Court of Appeals determined that there had, in fact, been a violation of the NLRA. Petitioner submits that analogous reasoning would deprive an informant of the violation of any law of the United States of all privilege until the conviction and determination on appeal of the guilt of the violator. This is surely not what this Court held in *Quarles*.

footnote 6, page 404, where numerous cases are cited as ". . . examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity. . . .")

Nor can the State justify this substantial abridgement of Petitioner's constitutional privileges and immunities on the basis of any compelling State interest. The "labor dispute" disqualification proviso found in some form in all state unemployment compensation acts, is directed primarily to the *voluntary* character of unemployment resulting from a strike, and secondarily to the principle of neutrality of government in labor disputes (i.e., strikers or "locked-out" employees should not be "subsidized" with unemployment benefits.) See, e.g., Hughes, Principles Underlying Labor Dispute Disqualification (Federal Security Agency 1946); Lesser, Labor Disputes and Unemployment Compensation 55 Yale L.J. 167 (1945); Lewis, The Concept of "Labor Dispute" in State Unemployment Insurance Laws, 8 B.C. Ind. and Comm. L. Rev. 29 (1966).

That policy is not directed to the situation here presented where an employee is laid off, according to her employer for economic reasons, and she informs the United States Government of her belief that such lay off is in violation of the NLRA. Under either the employer's or employee's view, the unemployment is not voluntary nor is it the employee's "fault", and she has been deprived of benefits solely upon the basis of the exercise of a constitutionally protected privilege and immunity.

The coercive effect of such disqualification is readily

apparent. Laid-off or fired employees who believe that their employer has committed an unfair labor practice in violation of federal law, will hesitate or abandon the report of such violation where the mere filing of charges results in an automatic disqualification from unemployment benefits. The subsistence level of income provided unemployed workers by such benefits is often their sole means of support, and deprivation clearly works a substantial hardship upon them. All such employees in the State of Florida are subject to this summary disqualification.

The federal scheme established in the National Labor Relations Act is dependent upon the freedom of employees to exercise their constitutionally protected right, privilege and immunity of reporting violations of the Act by filing charges within the NLRB. Filing NLRA charges is simply not an activity equivalent to striking, or other concerted activities which do, or may, consistent with the Fourteenth Amendment, provide a *per se* ground for disqualification from unemployment compensation benefits.

Petitioner does not seek any "double" compensation should the National Labor Relations Board ultimately find the employer guilty of the charge and make a back pay award in her favor. This Court made clear in *National Labor Relations Board v. Gullett Gin Co.*, (1951) 340 U.S. 361 that a state may recoup unemployment compensation benefits paid during a period for which the NLRB subsequently awards back pay. It was there stated, "Recoupment in such situations is a matter between the State and the employees." 340 U.S. at 365, footnote 1.

Thus, there is clearly a way for the State and Federal policies and laws to be harmonized without abridging

the privileges and immunities of citizens of the United States.

Just as in *Sherbert v. Verner*, supra, where this Court struck down a State's unemployment compensation policy which infringed upon constitutionally protected activity, Petitioner seeks herein the protection of her federal constitutional privilege and immunity to advise the Government of the United States of violations of its laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Neal Rutledge
Allan Milledge
Richard L. Horn
Counsel for Petitioner
601 Flagler Federal Building
Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Certiorari was mailed first class, postage prepaid to Patrick H. Mears, Esq., General Counsel, Caldwell Building, Tallahassee, Florida, and Lawrence Kanzer, Esq., Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, Florida Industrial Commission, and to W. Reynolds Allen and Glenn L. Greene, Jr., Esqs., Fowler, White, Gillen, Humkey and Trenam, 501 City National Bank Building, Miami, Florida, Attorneys for Respondents, The Stanley Works and Stanley Building Specialties, this_____day of February, 1967.

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No.

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

July Term, A.D. 1966

Tuesday, October 11, 1966

Case No. 66-330

MINNIE E. NASH,

Petitioner,

vs.

FLORIDA INDUSTRIAL COMMISSION
and THE STANLEY WORKS,

Respondents.

This cause having heretofore been submitted to the court on petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Board of Review of the Florida Industrial Commission, Unemployment Compensation Division, in said cause, bearing date of February 22, 1966, and the record having been considered, it is ordered that said petition be and the same is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal,
Third District

APPENDIX B

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, TALLAHASSEE, FLORIDA 32304

Board of Review Decision No. 66-38
Re: Referee's Decision Docket No. 65-4494U

In the Matter of:

Social Security Account No. 409-24-6136
Claimant-Appellant

Employer No. -020817

DECISION

After due notice to the parties, this cause came on for final administrative disposition by the Board of Review at Tallahassee, Florida, on February 16, 1966, and was reviewed upon the record.

The decision of the Appeals Referee is affirmed.

FLORIDA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

J. D. WRIGHT, JR., Chairman
WALTER L. LIGHTSEY, Member
FRANK M. NELSON, JR., Member

Date Mailed to the Parties: February 22, 1966
(Form Fla. BR-7)

APPENDIX C

Referee's Decision Docket No. 65-4494-U

FLORIDA INDUSTRIAL COMMISSION
UNEMPLOYMENT COMPENSATION APPEAL
TRIBUNAL, TALLAHASSEE, FLORIDA

UNEMPLOYMENT COMPENSATION CLAIM
Appeal from Determination of Claims Examiner

In the Matter of:

Social Security Account No. 409-24-6136
(Claimant-Appellant)
Employer No. -020817

DECISION OF APPEALS REFEREE

After due notice to the parties, hearing was held at Miami, Florida, on December 22, 1965. The claimant and an employer representative appeared and testified. A field deputy of the Commission also appeared and testified. Both the claimant and the employer were represented by counsel.

ISSUES INVOLVED: Whether claimant's total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment, or other premises at which she is or was last employed, as provided in Section 443.06(4)(a)(b); and whether the benefit payments made to claimant shall be charged to the unemployment record of employer (-020817), as provided in Section 443.08(3)(a), Florida Statutes, 1963.

HISTORY OF CASE: Claimant filed an initial claim for unemployment compensation benefits effective December 20, 1964, and filed additional claims effective May 16, 1965, and effective July 25, 1965, then filed another initial claim on December 20, 1965. On November 15, 1965, the Claims Examiner made a determination disqualifying claimant for benefits for the period beginning January 31, 1965, because unemployed due to a labor dispute in active progress at the premises at which she is or was last employed. Claimant was notified of that determination by mail dated November 15, 1965, and appealed on November 20, 1965.

FINDINGS OF FACT: Claimant became employed with employer (-020817) in 1961 or 1962. Subsequent to undertaking this employment, appellant became a member of United Steel Workers of America, Local 5571, AFL-CIO. This organization was the collective bargaining agent for workers with employer (-020817). On February 2, 1963, the union and the employer entered into a collective bargaining agreement that was effective until January 30, 1965. Prior to January 30, 1965, the union and the employer negotiated with respect to a new collective bargaining agreement. Prior to January 30, 1965, impasse was reached in such negotiations. On January 30, 1965, union members held an election and voted to strike the employer. This dispute concerned terms or conditions of continued employment with the employer for workers. At 12:01 a.m. on January 31, 1965, a picket line was established at the premises of employer (-020817) at which claimant was employed. Appellant and other workers of her grade or class withheld their services from the employer or performed active picket duty or both. All workers of the employer did not withhold their services

when this labor controversy began and so the employer continued operations. On March 30, 1965, a union representative contacted the employer's plant manager and offered to return the striking workers unconditionally to their jobs. On April 5, 1965, an employer representative informed the union's staff representative that the employer would take some of the striking workers back but not others. On April 5, 1965, the picket line was removed from the employer's premises. On April 6, 1965, the employer began processing those striking workers who were being taken back to work, back to their jobs. Appellant was not one of the striking workers the employer would not permit to return. She was returned to work unconditionally. The employer refused to permit approximately fifty workers to return to their jobs. On April 6, 1965, through the union, these workers filed charges with the National Labor Relations Board regarding their not being returned to work. The relief sought in these charges included the workers being returned to their jobs and paid back pay for time which they had lost from work. Appellant went back to work on April 14, 1965. She worked until May 16, 1965, and then was laid off by the employer for "slow production." On June 17, 1965, claimant filed charges with the National Labor Relations Board alleging that the employer had discriminated against her by separating her from her job. The relief appellant sought with these charges included being reinstated on her job and paid back pay for time which she had lost from work. On October 5, 1965, the employer, voluntarily, recalled claimant to work. After October 5, 1965, claimant worked until December 17, when the employer again separated her from her job. Claimant was separated from her job on December 17, 1965, because of a plant shutdown, customary with the employer, for the Christmas and New

Year's holidays. Appellant will be recalled to work when the employer's plant resumes operations. As of the date of the hearing, December 22, 1965, the charges which claimant had filed with the National Labor Relations Board against the employer on June 17, 1965, were unresolved and pending, as were the charges filed on April 6, 1965, by those workers the employer would not return to their jobs.

Claimant's unemployment for the period beginning January 31, 1965, to April 14, 1965, was due to a labor dispute in active progress at the premises at which she was last employed, and she is disqualified for benefits for such period. Claimant is eligible for benefits without disqualification for all periods, for which she claimed benefits, from May 16, 1965, to June 17, 1965. The employer's experience rating account is chargeable with any benefits which might be paid in connection with this claim for the period beginning May 16, 1965, to June 17, 1965. Claimant's unemployment from June 17, 1965, to October 5, 1965, was due to a labor dispute in active progress at the premises at which she was last employed, and she is disqualifed from receiving benefits for such period. Claimant is eligible for benefits without disqualification for all periods for which she claimed benefits for the period beginning December 17, 1965, and so long as her unemployment after such date is due to a plant shutdown. The employer's experience rating account is chargeable with any benefits which might be paid in connection with this claim for the period beginning December 17, 1965, and thereafter for any benefits paid claimant as a result of her unemployment being due to the employer's plant shutdown on December 17, 1965.

REASONS FOR DECISION: The Florida Unemployment Compensation Law provides:

"443.06 Disqualification for benefits—An individual shall be disqualified for benefits:

"(4) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the Commission that:

"(a) He is not participating in or financing, or directly interested in the labor dispute which is in active progress; provided, however, that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this section; and

"(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the

purpose of this subsection be deemed to be a separate factory, establishment or other premises."

Here, it has been shown that claimant's unemployment from January 31, 1965, to April 14, 1965, was due to a labor dispute in active progress at the premises at which she was last employed. It has also been shown that she actively participated in such dispute by performing active picket duty or withholding her services from the employer, or both. In view of these factors, appellant is properly subject to disqualification for benefits under the labor dispute provisions of the Law for the period beginning January 31, 1965, to April 14, 1965.

The testimony presented in this instance shows that on June 17, 1965, appellant filed charges with the National Labor Relations Board against the employer because of her separation on May 16, 1965, seeking, among other things, reinstatement on her job and back pay for the time which she had lost from work. It has further been shown that these charges were unresolved and pending when claimant was recalled to work by the employer, voluntarily, on October 5, 1965. These charges being filed and being unresolved and pending as of the date appellant returned to work constitute a labor dispute in active progress at the premises at which she was last employed between claimant and the employer. Consequently, here, it should be deemed that any unemployment appellant experienced during the period beginning June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she participated in such dispute. Therefore, it should be held that appellant is disqualified for benefits for the period beginning June 17, 1965, to October 5, 1965.

As appellant was separated from her job on May 16, 1965, due to "slow production" and did not dispute such separation until June 17, 1965, it should be held that she is qualified for benefits for all periods for which she filed claims for the period beginning May 16, 1965, to June 17, 1965. Granted, there was a labor dispute in active progress at the employer's premises when claimant was separated from her job on May 16, 1965, (such dispute being the labor controversy manifested by the charges with the National Labor Relations Board filed on April 6, 1965, by those workers who were not returned to their jobs and those charges being unresolved and pending when claimant's employment was terminated on May 16, 1965). But appellant's becoming unemployed on May 16, 1965, was not due to this dispute.

Although the charges filed with the National Labor Relations Board on June 17, 1965, by claimant were unresolved and pending when she was separated from her job on December 17, 1965, since she was separated from her job on this occasion due to a plant shutdown and will be recalled to work when the plant begins operations after the shutdown, it should not be deemed that her unemployment after December 17, 1965, and so long as her unemployment is due to the plant shutdown, is due a labor dispute in active progress.

DECISION: The determination of the Claims Examiner is hereby modified so as to hold as follows: claimant is disqualified for benefits, because unemployed due to a labor dispute in active progress at the premises at which she is or was last employed, for the period beginning January 31, 1965, to April 14, 1965; claimant is eligible for benefits without disqualification for all pe-

riods, for which she claimed benefits, from May 14, 1965, to June 17, 1965; the experience rating account of the employer is chargeable with any benefits which might be paid in connection with this claim for the period beginning May 14, 1965, to June 17, 1965; claimant's unemployment from June 17, 1965, to October 5, 1965, was due to a labor dispute in active progress at the premises at which she was last employed, and she is disqualified from receiving benefits for such period; claimant is eligible for benefits without disqualification, for all periods for which she claimed benefits, for the period beginning December 17, 1965, and so long as her unemployment after such date is due to plant shutdown; the employer's experience rating account is chargeable with any benefits which might be paid in connection with this claim for the period beginning December 17, 1965, and thereafter for any benefits paid claimant as a result of her unemployment due to the employer's plant being shut down as of December 17, 1965; and, as modified, the Claims Examiner's determination is affirmed.

JAMES R. PARKS
Appeals Referee

Date Mailed Claimant and Employer: Jan 14 1966

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1032 48

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

BRIEF OF RESPONDENT FLORIDA INDUSTRIAL COMMISSION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1032

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

BRIEF OF RESPONDENT FLORIDA INDUSTRIAL COMMISSION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CITATIONS TO OPINIONS BELOW

Respondent accepts those citations on pages 2–3 of the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on October 11, 1966, R. 54; Appendix A of the Petition. Petitioner invoked jurisdiction in this Court by Petition for Certiorari pursuant to 28 U.S.C., Section 1257(3), instead of availing herself of the following remaining Florida Appellate Court remedies: 1) The filing of a Petition for Rehearing in the District Court of Appeal, pursuant to Florida Appellate Rule 3.14. 2) The filing of a request in the Florida District Court of Appeal that said court certify to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest and 3) Upon the issuance by the District Court of said certificate, the subsequent filing of a Petition for Writ of Certiorari in the Florida Supreme Court to review the decision of the District Court. Article V, Section 4(2) Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6). It is Respondent's contention that by Petitioner's failure to exhaust the aforementioned remedies this Court lacks jurisdiction of her Petition. More specifically, Respondent contends that the Florida District Court of Appeal was not (as contended on pages 10–11 of the Petition) the highest state court in which Petitioner could seek the enforcement of her federal constitutional rights, since that court was the Florida Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the Constitutional and Statutory Provisions presented on pages 4–5 of the Petition for Writ of Certiorari. In addition, however, Respondent adds the following

pertinent Constitutional and Statutory provisions:

Florida Constitution, Article V, Section 4, paragraph 2 (the identical language is also found in 31 F.S.A. Appellate Rules, Rule 2.1(a) (5)b):

". . .Appeals from district courts of appeal may be taken to the supreme court as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with the decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

31 F.S.A., Appellate Rules, rule 4.5(c) (6) :

"From District Court to Supreme Court. Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision."

31 F.S.A., Appellate Rules, Rule 3.14 Rehearing:

"a. Time For. Unless further time is allowed, re-

hearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the Court."

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the judgment of the District Court of Appeal of Florida, Third District, pursuant to 28 U.S.C., Section 1257(3), when such judgment was not rendered by the highest Florida Court, in which a decision could be had, since Petitioner failed to exhaust her further appellate remedies of Petition for Rehearing in the Florida District Court of Appeal, pursuant to Florida Appellate Rule 3.14, request for certification by the Florida District Court of Appeal to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest, and upon issuance by the District Court of Appeal of such certificate, Petition for Writ of Certiorari in the Florida Supreme Court, pursuant to Article V, Section 4(2), Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6)?

2. Under Article VI, clause 2, and the 14th Amendment, Section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits solely because that citizen has filed an unfair labor practice charge with the National Labor Relations Board under the National Labor Relations Act 29 U.S.C. 141, et seq., such

disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?

STATEMENT OF THE CASE

Respondent accepts all portions of the "Statement of the Case" on pages 6–11 of the Petition except the statement in paragraph 5, page 10, thereof, that the District Court of Appeal of Florida, Third District, was "the highest state court in which Petitioner could seek enforcement of her federal constitutional rights." Respondent contends that the highest court in which such rights could be enforced was the Florida Supreme Court.

Respondent adds the following statements to the "Statement of the Case" appearing in the Petition:

Petitioner failed to file a Petition for Rehearing in the District Court of Appeal as authorized by Florida Appellate Rule 3.14. She further failed to file a request in the District Court for its certification to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest and further failed to file a Petition for Writ of Certiorari in the Florida Supreme Court, as authorized by Article V, Section 4(2) Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6).

ARGUMENT

QUESTION ONE RESTATED

1. Does this Court have jurisdiction to review the judgment of the District Court of Appeal of

Florida, Third District, pursuant to 28 U.S.C., Section 1257(3), when such judgment was not rendered by the highest Florida Court, in which a decision could be had, since Petitioner failed to exhaust her further appellate remedies of Petition for Rehearing in the Florida District Court of Appeal, pursuant to Florida Appellate Rule 3.14, request for certification by the Florida District Court of Appeal to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest, and upon issuance by the District Court of Appeal of such certificate, Petition for Writ of Certiorari in the Florida Supreme Court, pursuant to Article V, Section 4(2) Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6)?

Respondent respectfully submits that this question should be resolved in the negative.

Petitioner failed to exhaust her appellate remedies in the Florida District Court of Appeal by her failure to file a Petition for Rehearing in that Court, pursuant to Florida Appellate Rule 3.14.

Although the Florida Supreme Court has jurisdiction to review by certiorari any decision of a Florida District Court of Appeal, which such Court certifies to the Supreme Court passed upon a question of great public interest, pursuant to Article V, Section 4(2), Florida Constitution, 26 F.S.A. 145 Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6),Petitioner failed to file a request in the District Court for such certificate thereby precluding the vesting of any jurisdiction in the

Florida Supreme Court which would have occurred upon the issuance of a certificate and the subsequent filing of a Petition for Writ of Certiorari in the Florida Supreme Court.

In construing the authority granted to Florida District Courts of Appeal to issue such certificates, the Florida Supreme Court has held that jurisdiction vested in the Supreme Court upon such certification and the Supreme Court would not determine whether a District Court of Appeal had properly certified a decision as passing upon a question of great public interest. *Zirin v. Charles Pfizer Co.*, 128 So. 2d 594 (Fla. Sup. Ct. 1961), *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. Sup. Ct. 1959). While it is true that the Supreme Court has also held that Article V, Section 4(2), Florida Constitution, does not require it to decide a question certified by a Florida District Court of Appeal to be of great public interest, it has also held that upon such certification the Supreme Court is not limited to a decision of the question certified but may consider the decision itself. *Zirin v. Charles Pfizer Co.*, supra; *State v. Cruz*, 189 So. 2d 882 (Fla. Sup. Ct. 1966).

In other words, Petitioner, by her inaction in failing to seek a certificate of great public interest from the District Court precluded certiorari review in the Supreme Court. Such review, while discretionary, could have afforded Petitioner the enforcement of her federal constitutional rights on all issues involved.

In *Dresner v. City of Tallahassee* (1963), 375 U.S. 136, this Court granted certiorari to review a judgment of a Florida Circuit Court affirming a municipal court conviction for violation of a city unlawful assembly ordinance over the

Petitioner's federal constitutional challenges invoking their rights under the 14th Amendment to the United States Constitution. The respondents resisted certiorari review on the identical ground relied on by respondent herein, namely, that the judgment was not rendered by the highest Florida Court in which a decision could be had. This Court, pursuant to 31 F.S.A. Appellate Rules, rule 4.61, certified to the Florida Supreme Court questions concerning whether any higher Florida Court had jurisdiction to review the Circuit Court's judgment and whether such higher court would have been empowered to fully consider the federal constitutional questions presented.

Accordingly, the Florida Supreme Court fully responded to the certified questions in its opinion in *Dresner v. City of Tallahassee*, 164 So. 2d 208 (Fla. Sup. Ct. 1964) stating that the Circuit Court judgment was first reviewable by the Florida District Court of Appeal, First District, by Petition for Writ of Certiorari, pursuant to Article V, Section 5(3), Florida Constitution, and then, if necessary, by the Florida Supreme Court. Although the Supreme Court did not discuss the particular provisions for certiorari review referred to by Respondent herein, namely, the issuance by the District Court of a certificate of great public interest, it did allude to certain other avenues of certiorari or appellate review available in the Supreme Court, pursuant to Article V, Section 4(2) Florida Constitution, which also provides for the vesting of certiorari jurisdiction upon issuance of the certificate.

On page 212 of its Opinion, the Florida Supreme Court stated:

"We contribute an additional observation regarding a possible review of the decision of the Florida District Court of Appeal if its jurisdiction had been properly invoked in the

instant case. Under Florida Constitutional provisions a decision of the District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court, in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. . . *To this extent complete exhaustion of Florida's appeal process would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked.*" (Emphasis added)

In the footnotes to pages 10–11 of the Petition for Writ of Certiorari, it is alleged that further state court appellate review was precluded by the entry by the District Court of Appeal of a *per curiam* denial of Petitioner's Petition for Certiorari. In support of this contention Petitioner cites these three Florida Supreme Court cases: *Armstrong v. City of Tampa*, 106 So. 2d 407 (Fla. Sup. Ct. 1958); *Miami Herald Publishing Company v. Brautigam*, 121 So. 2d 431 (Fla. Sup. Ct. 1960); 127 So. 2d 718 (Third D.C.A. Florida 1960) certiorari denied, (1962) 369 U.S. 821; *Page v. State*, 113 So. 2d 557 (Fla. Sup. Ct. 1959).

Respondent respectfully submits that none of these cases are applicable since all involved direct appeals to the Florida Supreme Court from Florida trial courts and the Supreme Court held that it lacked jurisdiction because the judgments did not directly pass on the validity of a state statute or construe a controlling provision of the Florida or Federal Constitutions. The court then transferred the appeals to the appropriate District Court of Appeal having jurisdiction, pursuant to Florida Appellate Rule 2.1(5) (d), 31 F. S. A.

At no time has Respondent contended that the Supreme Court had appellate jurisdiction. We have consistently maintained that the only review available to Petitioner was by

certiorari in the Supreme Court.

In further support of its contention that a *per curiam* decision by the District Court precluded review in the Supreme Court, Petitioner cites, in the footnotes to page 11 of her petition, the case of *Adderley v. Florida* (1966) -U. S.-, 87 Sup. Ct. 242, where Petitioners claimed rights under the 14th Amendment as precluding their conviction under a trespass statute, and the District Court of Appeal of Florida, First District, entered a *per curiam* affirmance of the conviction. Although the same appellate course was apparently pursued by the petitioners in both the *Adderley* case and in our case, by the filing of Petitions for Writ of Certiorari in this Court to review *per curiam* decisions of the District Court in lieu of exhaustion of certiorari review in the Florida Supreme Court, it does not appear from this court's opinion in the *Adderley* case that jurisdiction was challenged by the respondents as it was in the case of *Dresner v. City of Tallahassee*, supra. It is well settled that contentions not raised in opposition to a petition for certiorari will not be considered by this Court. *Wiener v. United States* (1958) 357 U. S. 349.

Since the jurisdictional issue was never in question in the *Adderley* case, such decision cannot be deemed to be controlling on the jurisdictional issues raised herein.

It is therefore, respectfully submitted that since this Court in the *Dresner* case specifically disposed of the identical jurisdictional question involved herein by certified question to the Florida Supreme Court, the *Dresner* case is controlling herein.

It is further submitted that nowhere in the cases cited by

Petitioner or in the applicable provisions of the Florida Constitution and Appellate Rules is there any support for their contention that the entry of a *per curiam* judgment or decision by the Florida District Court of Appeal precludes certiorari review by the Florida Supreme Court.

QUESTION TWO RESTATED

2. Under Article VI, clause 2, and the 14th Amendment, Section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits solely because that citizen has filed an unfair labor practice charge with the National Labor Relations Board under the National Labor Relations Act 29 U.S.C. 141, et seq., such disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?

Respondent respectfully submits that this question be resolved in the affirmative.

Respondent recognizes that Petitioner, as a citizen of the United States, has been afforded the right to file an unfair labor practice charge with the National Labor Relations Board for reinstatement and back pay, pursuant to the provisions of the Labor Management Relations Act as well as her right to strike or engage in picketing activities. *Labor-Management Relations* Act, 29 U. S. C. A., Sections 160–163.

However, State unemployment compensation laws were enacted pursuant to the enactment of the Federal Social

Security Act of August 14, 1935. 42 U.S.C.A., Sections 301, 501, 601, 1103. State unemployment compensation statutes are designed to work closely with Federal legislation as part of a national plan to promote the social welfare. *81 C.J.S. Social Security and Public Welfare*, Section 80.

The constitutionality of State unemployment compensation statutes was long ago upheld by the U.S. Supreme Court in the case of *Carmichael v. So. Coal & Coke* (1937), 301 U.S. 495.

With regard to the authority of a State to choose the beneficiaries of unemployment compensation benefits, the Court said the following at pages 519–20 of the *Carmichael Decision:*

> "What we have said as to the validity of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits, the legislature is not bound to occupy the whole field. It may strike at the evil where it is felt most. . . or where it is most practicable to deal with it, . . ."

Therefore, the disqualification of a claimant for benefits pursuant to labor dispute disqualification statutes of state unemployment compensation laws, such as our Section 443.06(4) F. S., is authorized as an exclusion determined by the legislature. Such disqualification normally occurs as a result of unemployment due to a "labor dispute" in active progress. The term "labor dispute" as used in the cited statute means any controversy concerning "terms or conditions of employment". *Meyer v. Fla. Ind. Comm.* (Fla. App. 1959) 117 So. 2d 216. In most cases a "labor dispute" in active progress is manifested by a strike, picketing or lockout.

See Section 443.06(2) (b) 1 F.S., which includes a strike and lockout within the definition of the phrase labor dispute. See, also: *Unemployment Compensation Comm., Territory of Alaska v. Aragon* (1946) 329 U. S. 143. However, both the First and Second District Courts of Appeal of Florida have held that disqualifications are proper under Section 443.06(4) F. S., where active progress of a labor dispute is manifested by the filing of N.L.R.B. charges for reinstatement and back pay. *Meyer v. Fla. Ind. Comm.*, supra; *Post Times Co. v. Turner*, (Fla. App. 1960) 123 So. 2d 359.

It is not logical nor reasonable to conclude that the Petitioner's constitutional rights would be violated when she is disqualified for benefits upon filing of the N.L.R.B. charge but not upon resort to the other remedies of strike action or picketing afforded her under the same Federal law.

Petitioner places much reliance upon this Court's decision in *Sherbert v. Verner* (1963) 374 U. S. 398, where it was held that the disqualification by the South Carolina Employment Security Commission of a claimant for receipt of unemployment compensation benefits because of her failure to accept suitable work on Saturdays for purely religious reasons was an abridgement of her right to the free exercise of her religion guaranteed by the 1st Amendment of the United States Constitution. Petitioner, on authority of the cited case, now urges this Court to rule that Petitioner's disqualification by Respondent Commission for the filing of her National Labor Relation Board charge constituted an abridgement of her right under the United States Constitution to inform the United States of a violation of its laws.

If such reasoning could be approved by this Court as the

basis for such a ruling, then it would seem that the entire Section 443.06(4) F. S. might be declared invalid on its face. However, nowhere in the Petition are any cases cited wherein any state labor dispute disqualification statute was invalidated and Respondent has not been able to find any. On the contrary, as stated above, the courts have consistently held that such activities as strike action and picketing on the part of a claimant would normally justify disqualification for unemployment compensation benefits, although this Court has declared picketing to be activity involving the exercise of freedom of speech and of the press guaranteed by the United States Constitution. *Senn v. Tile Layers Protective Union* (1937) 301 U. S. 468, 478; *Thornhill v. Alabama* (1940) 310 U. S. 88, 101–106; *A. F. L. v. Swing* (1940) 312 U. S. 321, 323–326.

The case of *in Re Quarles* (1895) 158 U. S. 532, also heavily relied on by Petitioner, is clearly inapplicable herein. In *Quarles* this Court approved the applicability of Section 5508 of the Revised Statutes for the punishment of a criminal conspiracy against a certain informer by those persons whom he informed against concerning their criminal violations of the Internal Revenue Laws of the United States. In its Opinion this Court emphasized both the duty of private citizens to furnish information to assist peace officers in prosecution of breaches of the peace of the United States and the rights of such citizens to have their information treated as a confidential and privileged communication and their persons protected from any conspiracy to injure, oppress, threaten or intimidate them.

In contrast to the facts in *Quarles*, our case involves alleged "information" furnished in a National Labor Relations

Board charge by Petitioner, to the United States government to secure redress of certain purely private rights, namely, her reinstatement in her job with the Respondent employers with back pay. Our case is also distinguishable from *Quarles* in that no public duty was performed by Petitioner to assist United States law enforcement officials to prosecute any violations of its criminal laws. Moreover, there is in our case neither the existence nor the allegation of any criminal conspiracy against Petitioner in the exercise of her rights, pursuant to Section 5508, R. S.

It is therefore submitted that the filing of Petitioner's unfair labor practice charge does not contemplate the "informing" of the United States of any violation of its laws as contemplated by the *Quarles* case.

CONCLUSION

It is therefore respectfully submitted that the authorities and decisions cited by Petitioner in her Petition for Writ of Certiorari failed to show jurisdiction in this Court and therefore, said Petition should be denied.

If this Court takes jurisdiction and grants Certiorari, it is respectfully urged that the decision of the Florida District Court of Appeal be affirmed on the constitutional question presented for the reasons stated above.

Respectfully submitted,

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and
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FLORIDA INDUSTRIAL COMMISSION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari was mailed first class, postage prepaid to Rutledge and Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, Miami, Florida and to W. Reynolds Allen and Glenn L. Greene, Jr., Esqs,, Fowler, White, Collins, Gillen, Humkey and Trenam, 501 City National Bank Building, Miami, Florida, Attorneys for Respondents, The Stanley Works and Stanley Building Specialties, this 3d day of March, 1967.

PATRICK H. MEARS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1032

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS and STANLEY BUILDING SPECIALTIES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is not invoked by 28 U.S.C. §1257(3) because the decision of the District Court of Appeal, Third District of Florida, which Petitioner seeks to have this Court review is not a judgment or decree rendered by the highest court in Florida in which a decision could be had.

QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States may entertain Petitioner's Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District?

2. Whether Florida Statute §443.06(4) as applied to Petitioner in the decision below abridged Petitioner's privileges and immunities in violation of the Fourteenth Amendment of the United States Constitution?

3. Whether the decision below violated Article VI; Clause 2 of the United States Constitution?

ADDITIONAL CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

28 U.S.C.A. §1257:

"Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against the validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties

or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States . . . ."

Florida Constitution, Article V, §4(2):

"Appeals from trial courts may be taken directly to supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

> Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law." 26 F.S.A. Const. Art. V, §4(2).

Florida Statutes (1965) §443.07(4)(e):

> "Judicial Review.—Orders of the board of review entered pursuant to paragraph (c) of this subsection shall be subject to review only by petition for writ of certiorari to the district court of appeal in the appellate district in which the issues involved were decided by an appeals referee and the Florida industrial commission shall be made a party respondent to every such proceeding." 15 F.S.A. §443.07(4)(e).

Florida Appellate Rules (1965) §2.1(a)(5)(b):

> "(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon

> the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law". 31 F.S.A. Fla. App. R. §2.1 (a)(5)(b).

Florida Appellate Rules (1965) §4.5(c)(6):

> "'Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decisions.' '31 F.S.A. Fla. App. R. §4.5(c)(6).

STATEMENT OF THE CASE

The facts out of which this cause arises were stipulated to on December 22, 1965, between all the parties

to said cause and appear on pages 10, 11 and 12 of the Transcript of Testimony.[1]

Respondent specifically adopts the first four paragraphs of Petitioner's STATEMENT OF THE CASE. Respondent adopts the remainder of Petitioner's STATEMENT OF THE CASE except as indicated below.

On April 6, 1965, Petitioner's union filed unfair labor practice charges against Respondent claiming that Respondent's refusal to allow some 50 striking employees to return to work was in violation of the National Labor Relations Act, as amended. Petitioner was a member of said union and a member of the class of employees which caused this unfair labor practice charge to be filed against Respondent. Said charges were still pending before and unresolved by the National Labor Relations Board at all times germane to this cause (R. 12, 19).

After having participated in the strike against Respondent Petitioner was recalled to work on or about April 14, 1965. On May 14, 1965, Petitioner was laid off for what Respondent claimed to be economic reasons.

On May 17, 1965, Petitioner applied for unemployment compensation benefits under Florida Statutes, Chapter 443, and began receiving benefits effective May 16, 1965 (R. 1, 17).

On or about June 17, 1965, Petitioner contested the legality of her layoff by causing to be filed in her behalf an unfair labor practice charge against Respondent,

[1]The Transcript of Testimony has been filed as part of the official record herein, and citations to said Transcript will be indicated by a capital "R", followed by the appropriate page number.

claiming that: (1) her layoff was due to her activities in behalf of the union in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended; (2) she is entitled to full and immediate reinstatement to her former or an equivalent position; and, (3) she is entitled to back pay from Respondent for all wages lost because of her layoff (R. 12).

At all times germane to this cause, Petitioner has asserted before the National Labor Relations Board that her layoff was unlawful inasmuch as she was laid off because of her activities in behalf of the union and her participation in the earlier strike against Respondent.

At all times germane to this case, the unfair labor practice charge filed in behalf of Petitioner on June 17, 1965, was pending before and unresolved by the National Labor Relations Board.

The Board of Review of the Florida Industrial Commission, in upholding the Appeals Referee's Decision, found that Petitioner was not entitled to unemployment compensation during the period from June 17 to October 5, 1965, because her unemployment was due to a labor dispute in active progress at the premises at which she was last employed within the meaning of Florida Statute § 443.06(4), (R. 33, 40).

Thereafter, Petitioner filed her Petition for Certiorari directed to the Florida Industrial Commission, in the District Court of Appeal of Florida, Third District, pursuant to Florida Statute 443.07(4)(3).

Petitioner did not file a petition for rehearing with

the Third District Court of Appeal for Florida, nor, did Petitioner request that Court to certify the instant issues to the Florida Supreme Court. Petitioner did not attempt to have the District Court of Appeal's Decision reviewed by the Florida Supreme Court either by certiorari or appeal, but is attempting by its current Petition to have this Honorable Court grant direct review of the lower Florida appellate court's decision.

ARGUMENT

I. Petitioner's Petition for Writ of Certiorari should be denied because the decision sought to be reviewed is not a decision of the highest court in Florida wherein a decision could be had as required by 28 U.S.C. §1257(3).

While Florida Statute §443.07(4)(e) provides that the District Courts of Appeal have exclusive jurisdiction to *entertain* reviews from orders of the Board of Review of the Florida Industrial Commission, it contains no language nor does it infer any conclusion that the District Court of Appeal are courts of final review of such matters.

The statute provides in part:

> "Orders of the Board of Review—shall be subject to review only by petition for writ of certiorari to the district court of appeal. . . ." F.S.A. §443.07(4)(e).

Clearly this language itself does not buffer a District Court's decision from further appropriate review by the Florida Supreme Court. It merely indicates that the

initial appellate review of an order by the Board of Review of the Florida Industrial Commission shall be before a District Court of Appeal, not the Florida Supreme Court, a Circuit Court or any other of the State's courts. Had the Florida Legislature intended to make the District Courts of Appeal the courts of final determination in unemployment compensation matters, it most certainly would have done so by so providing in the statute itself. The absence of such a limiting provision clearly indicates the legislature's intent that a District Court of Appeal's review of an order of the Board of Review is subject to the same scrutiny by the Florida Supreme Court as any other decision of a District Court of Appeal.

The legislative history of Florida's Unemployment Compensation Act clarifies the issue.

Under the Unemployment Compensation Act of 1937, court review of the decision of the Board of Review was had:

> " . . . [B]y commencing an action in a court of competent jurisdiction against the Commission for the review of such decision. . . ." F.S.A. §443.07, History of Source of Law at 428.

Prior to the 1957 amendments of the Unemployment Compensation Act, Florida Statute §443.07(4)(e) provided for judicial review as follows:

> "(e) Judicial Review.—
>
> 1. Within the time specified in paragraph (c) of this subsection, the Commission, or any party

> to the proceedings before the board of review, may obtain judicial review thereof by filing in the circuit court of the county in which the party resides, or in the circuit court of Leon County, Florida, a petition for review of such decision. . . . " F.S.A. §443.07, History and Source of Law at 431.

In the amendments to the Act in 1957, the statute was changed to its current reading. *Infra* at 4.

It is clear that by amending the judicial review portion of the statute, the Florida Legislature merely changed the court of initial appellate review of unemployment compensation actions from the Circuit Courts to the District Courts of Appeal. It is also significant to note that the changing of the court of initial appellate review occurred during the same session of the Florida Legislature in which the District Courts of Appeal for the State of Florida were created. F.S.A. Ch. 35.

Further, there is no doubt but that prior to 1957 decisions rendered by the Circuit Courts in reviewing orders of the Board of Review were subject to review by the Supreme Court of Florida. *Jacksonville Paper Co. v. Johnson*, 55 So.2d 906 (1952). The current statute did not lessen the Florida Supreme Court's appellate jurisdiction of such matters.

From the legislative history, it is clear that in enacting the current statute, the legislature of Florida intended merely to change the court of initial appellate review for decisions by the Board of Review of the Florida Industrial Commission to the newly created District Courts

of Appeal. There is not the slightest indication that the legislature intended such decisions of the District Courts of Appeal, unlike all other decisions by such courts, to be the final, unreviewable decisions of the State of Florida's judicial system. Consequently, Petitioner's assertion that the decision of the Third District Court of Appeal in the instant cause was the decision of the highest court in Florida wherein a decision could be had is clearly without merit.

The fact is that Petitioner could have had the Third District Court's decision reviewed in the Florida Supreme Court. Fla. Const., Art. V §4(2); Fla. App. R. §2.1(a)(5)(b).[2]

Article V, §4(2) of the Florida Constitution concerns itself with the appellate jurisdiction of the Florida Supreme Court:

> "Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a

[2]Petitioner asserts that the decision of the District Court of Appeal being *per curiam* in nature precluded Petitioner from proceeding to the Supreme Court of Florida under Article V, §4 of the Florida Constitution and Appellate Rule 2.1(b). In the first place, Florida Appellate Rule 2.1(b) has nothing to do with petitions for certiorari, denials thereof, or appeals, but deals exclusively with the office and duties of the Clerk of Supreme Court of Florida. 31 F.S.A. Fla. App. R. §2.1(b). Further, Article V, §4 of the Florida Constitution contains nothing which even remotely supports Petitioner's assertion. *Infra* at 3.

> class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with the decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law". Fla. Const., Art. V, §4(2).

Florida Appellate Rule 2.1(a)(5)(b), contains the identical language of Article V, §4(2) of the Florida Constitution as cited above. 31 F.S.A. Fla. App. R. 2.1(a)(5)(b).

On the face of the Constitution and the applicable Florida appellate rule, it is apparent that Petitioner herein could have appealed to the Florida Supreme Court from the decision of the Third District Court inasmuch as by Petitioner's own admission that Court passed initially on the validity of a state statute, and initially construed it in light of the Fourteenth Amendment of the Federal Constitution.[3]

Consequently, Respondent contends that Petitioner could have appealed the District Court of Appeal's decision to the Florida Supreme Court as a matter of right.

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[3]In its Brief in the District Court of Appeal, Third District of Florida, in this same cause, Petitioner asserted:

> "To disqualify her subsequently solely because she files an unfair labor practice charge violates the Constitution of the United States, logic, and the policy of the Unemployment Compensation Law." (Reply Brief of Petitioner, p.8)

In said reply Brief, Petitioner fully argues its position that the Board of Review's application of Florida Statute 443.06 is unconstitutional as it abridges Petitioner's rights and priviliges under the "privileges and immunities" clause of the Fourteenth Amendment of the United States Constitution.

Also, reviewing Article V, §4(2) of the Florida Constitution and the Florida Appellate Rules 2.1(a)(5)(b) and 4.5(c)(6), it is clear that Petitioner could have requested the District Court of Appeal to certify the current issues to the Supreme Court of Florida as being questions of great public interest. *Zirin v. Charles Pfizer Co.*, 128 So.2d 594 (Fla.Sup.Ct. 1961). Had the District Court of Appeal been requested to certify such questions, and had it done so, there is no doubt but that the Supreme Court of Florida could have reviewed the District Court of Appeal's decision. *State v. Cruz*, 189 So.2d 882 (Fla.Sup.Ct. 1966); *Zirin, supra.*

However, it is clear that Petitioner herein did not even seek to have the District Court of Appeal certify the instant questions. That being the case, Respondent submits that Petitioner did not exhaust its state remedies, and further submits that the attempt to have such questions certified and the denial of such request is a condition precedent to any right that Petitioner might have to have this Honorable Court review the decision of the District Court of Appeals, as otherwise the decision is not one of the highest court in Florida wherein a decision could be had.

Petitioner's assertion that the decision of the District Court of Appeals being *per curiam* in nature precluded Petitioner from proceeding to the Florida Supreme Court is without merit. Such assertion clearly is not supported by the Florida Constitution or Florida Appellate Rules. *Infra* at 3-5.

It is true that up until recent years, the Florida Supreme Court consistently refused to grant a petition for

certiorari based on a conflict of decisions between the District Courts of Appeal where the decision sought to be reviewed was a *per curiam* decision. The reasoning appears to be that the decision being *per curiam* in nature, the Florida Supreme Court had no opinion to review from which it could determine whether or not in fact there was a conflict between the districts. However, even this position has been altered by the Florida Supreme Court, and since 1964, the Florida Supreme Court may go behind *per curiam* decisions by District Courts of Appeal even though the basis for the certiorari was a conflict between District Courts on the same point of law. *Fontainebleau Hotel, Inc. v. Forty-Five, Twenty-Five, Inc.*, 168 So.2d, 319 (Fla.Sup.Ct. 1964); *Young Spring & Wire Corp., v. Smith*, 168 So.2d 540 (Fla.Sup.Ct. 1964); *Foley v. Weaver Drugs, Inc.*, 168 So.2d, 749 (Fla.Sup.Ct. 1964); *Hoisington v. Kulchian*, 172 So.2d 585 (Fla.Sup.Ct. 1965).

Petitioner submits that the Florida Constitution, the Florida Appellate Rules and Florida case law clearly indicate that where a petition for writ of certiorari based upon a question certified by a District Court of Appeal to be one of great public interest, or an appeal as a matter of right is sought from a *per curiam* decision of a District Court of Appeal, the Supreme Court of Florida may review said decision. Respondent has found no law to the contrary.

Respondent respectfully submits that Petitioner has not exhausted its state appellate review procedures; that the instant decision of the District Court of Appeals, Third District of Florida, is not a "final judgment or decree rendered by the highest court of a state in which a decision could be had . . . ", within the meaning of 28 U.S.C. §1257(3); and, that, consequently, this Honor-

able Court should not grant the instant Petition. *Gothill v. Sills*, 84 S. Ct. 187, 375 U.S. 79 (1963); *Hammerstein v. Superior Court of Calif.*, 71 Sup.Ct. 820, 341 U.S. 419, *rehearing denied*, 72 S. Ct. 21, 342 U.S. 843 (1951); *Gorman v. Washington University*, 62 S. Ct. 962, 316 U.S. 98, *rehearing denied*, 62 S. Ct. 1272, 316 U.S. 711 (1942).

II. The Board of Review of the Florida Industrial Commission and the District Court of Appeal, Third District of Florida, did not violate Article Six or the Fourteenth Amendments to the United States Constitution by denying Petitioner benefits under the Florida Unemployment Compensation Act.

Petitioner asserts that the State of Florida has abridged Petitioner's privileges of immunities contrary to the Fourteenth Amendment to the United States Constitution by disqualifying Petitioner for unemployment benefits because she filed unfair labor practice charge with the National Labor Relations Board wherein she asserted that she was laid off because of her activity in behalf of the union and/or her union membership and sentiment. *Petition for Writ of Certiorari*, pp. 11-18.

In actuality, the decision of the Board Review of the Florida Industrial Commission denied Petitioner unemployment compensation benefits because her unemployment was due to a labor dispute at the place of her last employment within the meaning of Florida Statute §443.06 (4). *Id.* see Appendix C.

It is clear that a state has the authority to establish unemployment compensation acts by legislative enactment. In so doing, a state legislature has the power to determine the scope of the act and it need not occupy the whole field of unemployment. A legislature may lay down definitions and tests to be applied in the administration of the statute, and these functions fall within a state's police power. 81 *C.J.S.* Social Security and Public Welfare, § 81.

> "In determining the validity of such legislation it is not for the court to determine the merits of the law as enacted by the legislature, or, provided the act has a legitimate end and the means are reasonably related to that end, to question the wisdom or workability of the scheme set up by the legislature, or to say that some plan other than that adopted by the legislature would be preferable, or that experience might demonstrate the economic fallacy of the particular plan promulgated."
>
> "Questions as to the manner of the operation of the act are legislative questions and ordinarily are not within the power of the court to consider and determining the validity of the act." *Id.* at 121.

In *Unemployment Compensation Commission v. Aragon*, 67 S.Ct. 24, 329 U.S. 143 (1946), the United States Supreme Court clarified the state's authority in interpreting and applying its unemployment compensation act, and the scope of appellate review of such state determinations.

> "Here, as in National Labor Relations Board v. Hearst Publications, Inc., 1944, 322 U.S. 111,

131, 64 S.Ct. 851, 860, 861, 88 L. Ed. 1170, the question presented 'is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially.' To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'. *(Citations omitted)*

Applying these tests, we are unable to say that the Commission's construction was irrational or without support in the record. The Commission apparently viewed a dispute as 'active' during the continuance of a work stoppage induced by a labor dispute. That agency might reasonably conclude that the unemployment resulting from such work stoppage is not of the 'involuntary' nature which the statute was designed to alleviate, as indicated by the statement of public policy incorporated in the Act by the Territorial Legislature. We see nothing in such a view to require our substituting a different construction from that made by the Commission entrusted with the responsibility of administering the statute'." *Id.* at 250, 251.

The North Carolina Supreme Court in *In Re Abernathy*, 130 S.E.2d 292 (N.C.Sup.1963), *cert. den.,app.dism.* 84 S.Ct. 274, 375 U.S. 161 (1963) stated:

"'When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome,' Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed.1167;. . . . 'Legislative bodies may distinguish, select, and classify objects of legislation. * * * They may prescribe different regulations for different classes * * *. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination.' . . .; see also, . . .; Magoun v. Ill. Trust & Savings Bank, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed 1037; . . .; Steward & Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279. The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. Further disqualifications contained in the 1961 amendment involves a question of degree and not of principle.'" *Id.* at 299.[4]

[4]The Court in *Abernathy* held that the North Carolina Court's interpretation of its Unemployment Compensation Act, which is closely akin to Florida's, so that flight engineers who refused to cross picket lines at Employer's North Carolina operation were not eligible to receive unemployment compensation, was constitutional when tested by the Fourteenth Amendment of the Constitution of the United States.

It is patently clear that in filing of an unfair labor practice charge with the National Labor Relations Board that an employee admits that his unemployment is due to his employer's disagreement with or opposition to the employee's union activities and/or membership. This is the very essence of an unfair labor practice charge contesting the legality of an employee's discharge or layoff, for if the discharge or layoff is not motivated by "anti-union animus" it is not illegal under the National Labor Relations Act, as amended. *N.L.R.B. v. Jones & Laughlin Steel Co.*, 57 S.Ct. 615, 301 U.S. 1 (1937); *N.L.R.B. v. McGahey*, 233 F.2d 406 (5th Cir. 1956). When Petitioner filed an unfair labor practice charge with the National Labor Relations Board she asserted then and there that her unemployment was due to her participation in activities in behalf of the union and/or her membership therein. There is no more classic example of a labor dispute.

That the State of Florida may interpret Petitioner's unemployment to be due to a labor dispute in active progress because she filed an unfair labor practice charge with the National Labor Relations Board, and that such interpretation has "warrant in the record" and a "rational basis in the law", is apparent, particularly in light of the traditional and constitutionally acceptable definitions of a labor dispute.[5]

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[5]Section 13 (c) of the Norris-Laguardia Act defines a labor dispute as including:

"any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." *Order of Railroad Telegraphers v. Chicago & N.W. R. Co.*, 80 S.Ct.

Therefore, Respondent respectfully submits that the Board of Review's interpretation and application of the clause "'due to a labor dispute" found in Florida Statute, §443.06 (4) so as to deny Petitioner unemployment benefits is logical, reasonable and well supported in the record. Therefore, this Court should refuse to review and/or upset the Board of Review's construction of the statute in question.

Petitioner cites the case of *In Re Quarles*, 15 S.Ct. 959, 158 U.S. 532 (1895) to support its constitutional argument. Respondent respectfully submits that *In Re Quarles* is an inapposite to the present cause as Petitioner seeks enforcement of her private rights. See *Brief for Respondent Florida Industrial Commission* at 14, 15.

Further, Petitioner implies that in *Sherbert v. Verner*, — S.Ct. —, 374 U.S. 398 (1963) this Court held that an employee's right to file an unfair labor practice charge is a "privilege or immunity" within the meaning of the Fourteenth Amendment. Respondent respectfully submits that *Sherbert* does not so hold either directly or by implication.

761, 362 U.S. 330 (1960); See also *Sinclair Refining Co. v. Atkinson, Ind.*, 82 S.Ct., 138, 1331, 370 U.S. 195 (1962); *Marine Cooks and Stewards AFL v. Panama S.Co.* 80 S.Ct. 779, 783, 362 U.S. 365 (1960); *Aragon, supra; Columbia River Packers Ass'n v. Hinton*, 62 S.Ct. 520, 521, 522, 350 U.S. 143 (1942).

Also, the State of Florida has uniformly defined a labor dispute as including:

" . . . [A]ny controversy between employer and employee concerning wages, hours, and working conditions or terms of employment.". *Meyer v. Florida Industrial Commission*, 117 So.2d 216 (2nd Dist.Ct. App. 1959); *Post Times Co. v. Turner*, 123 So.2d 359 (1st Dist.Ct. App. 1960); *Gore et al v. Florida Industrial Commission*, 181 So.2d 233 (3rd Dist. Ct. App. 1965).

Respondent submits that the receipt of unemployment compensation benefits is neither a "privilege or immunity" nor a right entitled to protection under the United States Constitution.

However, even if the "right" to file an unfair labor practice charge and/or the "right" to receive unemployment compensation are protected rights under the United States Constitution the ruling of the State of Florida in the instant cause does not unlawfully, unconstituionally or improperly restrict the exercise of such "rights".

The right to strike and/or picket are probably the working man's most basic tools in the process of self help in the effectuation of the rights guaranteed him under Section 7 of the National Labor Relations Act, as amended. The right to engage in peaceful picketing has been equated to freedom of speech protected from unlawful abridgment by a state by the Fourteenth Amendment to the United States Constitution. *Thornhill v. State of Alabama*, 60 S.Ct. 736, 310 U.S. 88 (1940); *A.F.L. v. Swing*, 61 S.Ct. 568, 312 U.S. 321 (1940); *Bakery and Pastry Drivers & Helpers Local 802 International Brotherhood of Teamsters v. Wohl*, 62 S. Ct. 816, 315 U.S. 769 (1942); *Johnson v. White Swan Laundry*, 41 So.2d 874 (Fla.Sup.Ct. 1949). Further, there is no doubt but that the right to strike, so long as such right is exercised in a lawful manner, is entitled to protection under the Fourteenth Amendment from unreasonable infringement by a state. 16 *C.J.S.* Const. Law §213.

Although federal recognition and protection of such rights is generally accepted, the validity of state unemployment compensation acts which deny employees unem-

ployment compensation benefits when their unemployment is due to participation in striking and/or picketing is almost universally recognized.[6]

By analogy, if a state may hold that an employee who is unemployed because he is participating in these constitutional freedoms may be denied unemployment benefits, it follows axiomatically that a state may hold that an employee may be denied unemployment compensation benefits because he filed an unfair labor practice charge with the National Labor Relations Board. Of course this is true only so long as such disqualification is applied uniformly to all citizens similarly situated. Respondent submits that there is no reason to afford the "right" to file such charges more protection than the recognized right to strike and/or picket.

Such conclusion is further buttressed by the fact that the right to file unfair labor practice charges is created and protected by the same federal law that gives employees the right to strike and/or picket, *i.e.* The National Labor Relations Act, as amended. Consequently, Respondent submits that if a state may constitutionally deny unemployment compensation benefits to an employee who is engaged in striking and/or picketing, the State of Florida may constitutionally deny Petitioner unemployment com-

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[6] *In Re Abernathy, supra; Aragon, supra; The Ruberoid Co. v. Unempl.* Ins. App., 50 LRRM 85 (Calif. Dist.Ct. App. 1962); *Gillan v. Admr. Unempl. Comp. Act.* 50 LRRM 86 (1962); *Achenbach v. Review Bd. of Indiana Empl. Comm'n. Div.*, 49 LRRM 112 (Ind.Sup. Ct. 1962); *Weltner of Kansas Empl. Sec. Bd. of Rev.*, 53 LRRM 98 (Kansas Sup.Ct. 1963); *Johnson v. Kentucky Unempl. Ins. Comm'n.*, 53 LRRM 100 (Ky.Ct. App. 1963); *Wheeler v. Director of Div. of Empl. Sec.* 56 LRRM 148 (Mass. Sup. Jud. Ct. 1964); *Weiss v. Klein Markets, Inc.*, 47 LRRM 90 (Minn. Sup. Ct. 1961); *O'Dell v. Division of Empl. Sec.*, 55 LRRM 131 (Mo. Sup.Ct. 1964); *Marczi v. Bd. of Education*, 46 LRRM 115 (N.J. Sup.Ct. App. Div. 1960), *ad infinitum*

pensation because she filed an unfair labor practice charge with the National Labor Relations Board.

When a state denies an employee unemployment compensation because his unemployment is due to his participation in a strike and/or picketing, the state is not abridging the employee's rights to engage in these activities, but is merely holding that the state will not allow unemployment compensation benefits in such an instance. Similarly, in denying unemployment compensation to Petitioner, the Board of Review did not interfere with Petitioner's "right" to file an unfair labor practice charge, but merely put Petitioner to an election of rights, remedies and forums.

If Petitioner could not receive full redress from the National Labor Relations Board for her "ill treatment", Petitioner's constitutional argument would be more tenable. However, the fact is, should Petitioner prevail before the National Labor Relations Board that federal agency has the power and authority to give Petitioner just what she asks for, *i.e.* reinstatment and back pay. National Labor Relations Act, as amended § 10 (c); *N.L.R.B. v. Washington Aluminum Co.*, 82 S.Ct. 1099, 370 U.S. 9 (1962).

Further, in conjunction with Petitioner's arguments under Article Six and the Fourteenth Amendment, Respondent submits that the decision of the Board of Review of the Florida Industrial Commission and the Florida District Court of Appeal effectuates the principle of federal preemption as first set forth in the case of *San Diego Building Trades Council v. Garmon*, 79 S.Ct. 773, 359 U.S. 236 (1959). That the cause of Petitioner's unemployment is "arguably an unfair labor practice" is made ap-

parent by Petitioner's very act of filing an unfair labor practice charge asserting an illegal motive as the cause for the cessation of her employment.

The general teaching of *Garmon* is that if the activity out of which the cause arises is arguably an unfair labor practice the National Labor Relations Board has exclusive jurisdiction to entertain the cause and remedy the harm. Except in some unusual circumstances, the state and federal courts are directed to "keep hands off".

The decision of the Board of Review would seem to effectuate this policy as it holds, in effect, that when an employee files an unfair labor practice charge with the National Labor Relations Board he claims that the cause of his unemployment is "arguably an unfair labor practice", and when such is the case the Florida Industrial Commission will defer any action concerning his unemployment to the forum which in its expertise is most well equipped to handle and remedy the matter. That forum is the National Labor Relations Board. Respondent submits that such a ruling is clearly constitutional and within the spirit of this Court's decision in *Garmon*.

For reasons enumerated above, Petitioner's argument that the instant decision is unconstitutional under Article Six, Clause Two of the United States Constitution is clearly without merit, as said decision is in no manner in conflict with the Constitution or any law of the United States. 16 *C.J.S.* Const. Law §3, §68.

Finally, Respondent would point out to the Court that there is no showing nor any argument by Petitioner that

the decision at issue herein goes beyond the police power of the State of Florida.

In summary, Respondent respectfully submits that even if this Honorable Court has jurisdiction to entertain Petitioner's *Petition* that the decision of the Board of Review, and the District Court of Appeal's affirmance thereof, are constitutional and well within the boundaries of established federal and state constitutional, statutory, and case law.

Therefore, Respondent respectfully submits that Petitioner's *Petition* should be denied.

CONCLUSION

Respondent respectfully submits that the instant Petition should be denied because (1) jurisdiction to entertain said Petition does not lie in this Court, and, in the alternative, (2) the Petition does not raise any issue, constitutional or otherwise, warranting review by this Honorable Court.

Respectfully Submitted,

GLENN L. GREENE, JR.

GLENN L. GREENE, JR.

W. REYNOLDS ALLEN

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OF COUNSEL:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to Lawrence Kanzer, Esquire, Attorney for Respondent, Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida and Richard L. Horn, Esquire, Rutledge & Milledge, 601 Flagler Federal Building, 111 N. E. First Street, Miami, Florida, Attorneys for Petitioner, this 21st day of March, 1967.

W. REYNOLDS ALLEN

W. REYNOLDS ALLEN

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1033/48

Office-Supreme Court, U.S.
FILED
APR 3 1967
JOHN F. DAVIS, CLERK

MINNIE E. NASH,

Petitioner,

vs.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS and STANLEY BUILDING SPECIALTIES,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1032

MINNIE E. NASH,

Petitioner,

vs.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS and STANLEY BUILDING SPECIALTIES,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Respondent Florida Industrial Commission has attacked the jurisdiction of this Court to review the decision of the District Court of Appeal of Florida, Third District,

herein, upon two grounds: (a) no petition for rehearing was filed in the District Court of Appeal below; (b) no suggestion was made to the District Court of Appeal below that that Court certify that it had passed upon a question of great public interest.

The respondent Employer in its Brief in Opposition filed herein, concurs in ground (b) above, makes no mention of ground (a), and further suggests that some review by appeal was available to petitioner in the Florida Supreme Court, a suggestion correctly rejected by respondent Florida Industrial Commission (Br. for Resp. Fla. Ind. Comm., pp. 9-10) by its express concession that the Florida Supreme Court had no appellate jurisdiction in this case.

Petitioner submits that these "scatter shot" attacks upon the jurisdiction of this Court, based upon purported review being available in the Florida Supreme Court, are completely without merit under the applicable State law and practice, and the practice and procedure of this Court. As stated in the petition, there was no jurisdiction by certiorari or appeal in the Florida Supreme Court from the simple *per curiam* denial of certiorari by the District Court of Appeal entered herein without opinion. Petitioner would have assumed that these jurisdictional matters were sufficiently well settled so as not to have provoked the lengthy and wholly erroneous dissertations on jurisdiction filed herein by respondents. Further, petitioner's citation of the very recent case of *Adderley v. State of Florida*, 382 U.S. 1023, 87 S. Ct. 242 (November 14, 1966) (Pet. for Cert., p. 11) — a case arising from a similar *per curiam* denial of certiorari by the District Court of Appeal of Florida, First District, 175 So. 2d 249, wherein procedurally identical constitutional issues were raised and

where the Attorney General of the State of Florida and this Court, 87 S. Ct. at 244, recognized that no further review was available in the Florida Supreme Court — would have seemed an adequate, squarely-in-point precedent.

Reply to the respondents' jurisdictional assertions will be made, however, in order to dispel any doubt which may have been cast upon the jurisdiction of this Court to review this case at this time.

We deal first with the contention that the Florida Supreme Court has jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Courts of Appeal. *Callendar v. State*, 181 So. 2d 529 (Fla. Sup. Ct. 1966), followed by *Callendar v. Florida*, 383 U.S. 270 (1966), fully answer such contentions. We append the full opinion of the Supreme Court of Florida in *Callendar* to this reply, *infra* at Appendix pp. 1-7, and respectfully submit that this case is squarely controlling. It is obvious that *Adderley v. State of Florida, supra*, was decided in full recognition of *Callendar*, and respondent employer's assertions as to jurisdiction in the Supreme Court of Florida by appeal or otherwise are completely without merit.

Secondly, this Court's decisions in *Southern R. Co. v. Clift*, 260 U.S. 316 (1922), and *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548 (1945), provide a complete and categorical answer to Respondent Florida Industrial Commission's ground (a) above, respecting the finality of a state court judgment in the absence of a petition for rehearing. Such judgments become final on the day that they are rendered, and no petition for rehearing is required. See also: Wolfson and Kurland, *Robertson*

& Kirkham, Jurisdiction of the Supreme Court of the United States, Secs. 43, 44, pp. 75-76; Stern and Gressman, *Supreme Court Practice* (3rd Ed. 1962), Sec. 3-19 pp. 85-86.

As for ground (b) above, petitioner obviously agrees with respondents (for the reasons stated in her petition) that the District Court of Appeal below did pass upon a question of great public interest, and one which affects every employee in the State of Florida, in its *per curiam* denial of certiorari. The question here, however, is whether the filing of a "suggestion" with the District Court of Appeal that a certificate of great public interest be issued is a jurisdictional prerequisite to review in this Court, in the absence of which a *per curiam* decision of a Florida District Court of Appeal may not be considered a decision " . . . by the highest Court of a State in which a decision could be had." . . . 28 U.S.C. §1257.

Petitioner knows of no other case on certiorari or appeal to this Court from a Florida District Court of Appeal in which a similar contention has been made, and for good reason. The case of *Whitaker v. Jacksonville Expressway Authority*, 131 So. 2d 22 (1st D.C.A. Fla. 1961), provides the following with respect to the procedural step which respondents desire to have this Court hold a "condition precedent" (Br. of Resp. Employee, p. 13) to its review:

> "Inherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it *does not* pass upon a question of great public interest; and when the labor of the court has term-

inated with its final decision and the issuance of its mandate thereon, it no longer has jurisdiction to enter a certificate of the character under discussion.

"* * *

"Since the right of review does not lie from a failure or refusal of a District Court of Appeal to certify any decision rendered by it as one that passes upon a question of great public interest, a pleading of the character under discussion is not a motion in the strict legal sense. It has no efficiency other than to invite the court's attention to the factors which the pleader believes to be important in *suggesting* that the decision be certified as passing upon a question of great public interest. At this juncture we wish to observe that it is not amiss and that this court will welcome the filing by any interested person, at any time prior to the expiration of the period of time allowed for filing of a petition for rehearing, of a suggestion to that effect, fortifying it with the factors that make it so; bearing in mind that such pleading has no legal effect.

"* * *

"In summary, we hold (1) that a party litigant is not entitled as a matter of right to have an order entered by this court disposing of any pleading the purpose of which is to cast on this court the duty to certify one of its decisions as one that passes upon a question of great public interest; (2) that at any time prior to expira-

> tion of the time allowed for filing a petition for rehearing any interested person may file in a pending cause a suggestion that the decision therein be certified as aforesaid, stating therein the factors upon which such suggestion is predicated; (3) that no formal order is necessary to dispose of such suggestion; (4) that any certificate by the court to the effect that a decision passes upon a question of great public interest shall in all cases be upon the court's own motion." 131 So. 2d at 23, 24. (Emphasis in the original).

The nature of the document or "suggestion" which respondent asserts is a jurisdictional prerequisite to review in this Court can easily be seen from the foregoing. A pleading to the lower appellate court of "* * * no legal effect * * *," 31 So. 2d at 24, for the disposition of which " * * * no formal order is necessary * * *," *Ibid*, is not and cannot be jurisdictional in this Court. Obviously, and as pointed out in *Whitaker*, this procedure is not only within the completely non-reviewable discretion of the District Court of Appeal, but also such certificates are issued only upon " * * * the court's own motion" and are completely an internal matter for the District Court of Appeal to decide in ruling on the case. Thus it can be seen that a "suggestion" is not in any sense a matter of invoking the discretionary review of a higher court, but rather a plea of no legal significance that the lower appellate court decide the case in a particular way. In practice, the District Courts of Appeal usually make such certification on their own initiative in their initial opinion deciding a case. *E.g.*, *Hines v. State*, 186 So. 2d 820 (1st

D.C.A. Fla. 1966); *McCray v. State*, 181 So. 2d 729 (1st D.C.A. Fla. 1966).*

Nothing in any of the cases cited by respondents is to the contrary. The opinion of the Florida Supreme Court in *Dresner v. City of Tallahassee*, 164 So. 2d 208 (Fla. 1964), cert. dismissed, 378 U.S. 539, makes no mention whatever of the certification of public importance procedure, and the language quoted by Respondent Florida Industrial Commission therefrom (Br., pp. 8-9) is expressly limited to the Florida Supreme Court's "direct conflict" certiorari jurisdiction. See Article V, Section 4(2), Florida Constitution.

No contention has been or can be made by respondents that any such "conflict" certiorari jurisdiction was here present in the Florida Supreme Court for as respondents correctly point out (Br. of Resp. Fla. Ind. Comm., p. 13; Br. of Resp. Employer, p. 20), the District Courts of Appeal of Florida are unanimous in denying unemployment compensation benefits to any unemployed person who has filed an unfair labor practice charge with the National Labor Relations Board against his employer. *Meyer v. Florida Industrial Commission*, 117 So. 2d 216 (2d D.C.A. Fla. 1959); *Post-Times Co. v. Turner*, 123 So. 2d 359 (1st D.C.A. Fla. 1960); *Gore v. Florida Industrial Commission*, 181 So. 2d 233 (3rd D.C.A. Fla. 1965). This unanimity clearly precludes any suggestion that "direct conflict" certiorari jurisdiction was present in the Florida Supreme Court.

*It would obviously be a puzzling contradiction for a court, on the one hand, to decide a case by a *per curiam* order without any opinion or discussion and, on the other hand, certify the case as one involving a question of great public interest. Petitioner knows of no instance where any District Court of Appeal of Florida has so acted.

The Florida Supreme Court in the two cases exhaustively considering its jurisdiction and that of the District Courts of Appeal with regard to the jurisdiction of this Court, *Dresner v. Tallahassee, supra,* and *Callendar v. State, supra,* has never even intimated that a suggestion to the District Court of Appeal for certification of great public interest was essential to the finality of a District Court of Appeal judgment prior to review by this Court.

Once past the finality question, Respondent Florida Industrial Commission concedes that the constitutional issues advanced in our petition are squarely presented. Thus, its brief (pp. 4-5) poses as the second "question presented", the following:

> "Under Article VI, clause 2, and the 14th Amendment, Section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits *solely* because that citizen has filed an unfair labor practice charge with the National Labor Relations Board . . . *such disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?*" (Emphasis added)

Respondent employers, however, suggest in *their* brief (pp. 19,23) that the disqualification was not for filing the charge, but rather because of an underlying labor dispute reflected by the filing of the charge. This suggestion is untenable. As shown above, the Commission which ren-

dered the decision *concedes* that its decision was based "solely" on the filing of the charge. Moreover, the decision itself is not subject to the interpretation advanced by the employers. Petitioner contended in her charge to the NLRB that the *entire* period of her layoff was unlawful, yet the Commission awarded her unemployment compensation for the period of the layoff preceding the filing of the charge. It is thus clear beyond dispute that it was the *charge*, not the underlying events, which the Commission held to be disqualifying. As its opinion made clear:

> "*These charges* being filed and unresolved and pending as of the date appellant returned to work *constitute a labor dispute* in active progress at the premises at which she was last employed between claimant and the employer." (R. 33) (Emphasis added)

Respondent employers also suggest (p. 23) that petitioner is adequately protected because the NLRB has power to award her back pay. This contention, too, is fallacious. *If the NLRB decides favorably to petitioner*, it is true that she will receive back pay (and any unemployment compensation already received can be recouped by the State, *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951)). *But if the NLRB decides favorably to the employer*, i.e. finds that the layoff was indeed for economic reasons, petitioner will have suffered a grievously unjust injury. For then, under the decision below, she would receive no compensation from any source, whereas if she had not filed the charge she would have received unemployment compensation. Plainly, this is the imposition of a penalty by the State for filing a charge with the NLRB, violative of both

the supremacy and "privileges and immunities" clauses of the federal Constitution.

Petitioner submits that the Court below did in fact pass upon a question of great public interest and importance as now underscored and "certified" by respondents; that this Court has jurisdiction to consider the question; that petitioner was disqualified from unemployment compensation benefits solely because she filed an unfair labor practice charge with the National Labor Relations Board; that such disqualification is the imposition of a penalty which violates Article VI, Clause 2, and the 14th Amendment, Section 1, United States Constitution; and petitioner respectfully urges this Court to consider the question by granting the petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply To Respondents' Briefs In Opposition To The Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District, was mailed airmail, postage prepaid, to Patrick H. Mears, Esq., General Counsel, Caldwell Building, Tallahassee, Florida, and by regular mail, postage prepaid, to Lawrence Kanzer, Esq., Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, Florida Industrial Commission, and to W. Reynolds Allen and Glenn L. Greene, Jr., Esqs., Fowler, White, Collins, Gillen, Humkey & Trenam, 501 City National Bank Building, Miami, Florida 33130, Attorneys for Respondent, The Stanley Works and Stanley Building Specialties, this 3 day of ~~March~~ April, 1967.

Of Counsel

APPENDIX

Herbert Ebenezer Callendar, Appellant,

v.

State of Florida, Appellee.

Leslie Smith, Appellant,

v.

State of Florida, Appellee.

James O'Connor, Appellant,

v.

State of Florida, Appellee.

Nos. 32648-32650.

Supreme Court of Florida.

Jan. 5, 1966.

Ernest D. Jackson, Jacksonville, for appellants.

Earl Faircloth, Atty. Gen., and George R. Georgieff, Asst. Atty. Gen., for appellee.

PER CURIAM.

The Appellants, Callendar, Smith, and O'Connor were convicted in the County Judge's Court for Marion County on a charge of unlawful assembly in violation of F.S. § 870.02, F.S.A. Their appeal to the circuit court was dismissed on motion of the State Attorney for failure to comply with the appropriate Florida Appellate Rules. In his order dismissing the appeals the circuit judge added that he had nevertheless examined the record and briefs and found the appeals to be without merit. While it is

not vital to our disposition of this cause we note that the notices of appeals before the circuit judge sought review of the verdict of the jury, the order denying the defendants' motion for new trial, and the sentence imposed on the defendants, but not of the judgment of guilt. Neither the verdict of the jury nor the order denying new trial are appealable orders. A sentence is appealable by a defendant only on the grounds that it is excessive or illegal. F.S. Section 924.06 (4) F.S.A. It does not appear that the appellants contended that the sentence itself was either illegal or excessive. This circumstance may well account for the gratuitous statement by the circuit judge that he found the appeal to be without merit.

Following the dismissal of their appeals the appellants petitioned the District Court of Appeal, First District, for writ of common law certiorari, which petition was denied in an order reading: "Per Curiam. Certiorari denied." Callendar v. State, Fla. App.1963, 151 So.2d 80; Smith v. State, Fla.App.1963, 151 So.2d 80; O'Connor v. State, Fla. App.1963, 151 So.2d 80.

From these orders each of the appellants took an appeal to this Court, which appeals were dismissed by us, ex mero motu, because they presented no question within our jurisdiction to review. Article V, Section 4(2), Florida Constitution, F.S.A.

Thereafter the Supreme Court of the United States granted certiorari and reversed our order dismissing these appeals by a per curiam decision in the following words (380 U.S. 519, 85 S.Ct. 1325, 14 L.Ed. 2d 265. Decided April 26, 1965):

"The petition for writ of certiorari is granted and the judgments are reversed. Boynton v. Com. of Virginia, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed. 2d 206; Abernathy v. State of Alabama, 380 U.S. 447, 85 S.Ct. 1101, 14 L.Ed.2d 151."

Upon receiving the Mandate of the Supreme Court of the United States in these causes we entered an order remanding them to the District Court of Appeal, First District, with instructions that they in turn be remanded to the circuit court and then to the County Judge's Court, Marion County, and that the judgments and sentences be vacated.

Following our order the State petitioned for rehearing which we granted. After hearing oral argument on rehearing we have determined that our first order entered on the mandates was erroneously made and therefore must be, and is, withdrawn for reasons to be discussed below.

The jurisdiction of this Court, the Supreme Court of Florida, is both limited and defined by the constitution of this State. Section 4(2) Article V, Florida Constitution. Insofar as appellate review of decisions of the several district courts of appeal is concerned we have authority to entertain an appeal of a decision of one of those courts only if the decision either (1) initially (for the first time in the cause) passed directly upon the validity of a state or federal statute, or (2) construed a controlling provision of either the state or federal constitution. For meaning of "construing" a constitutional provision as used in our constitution see Armstrong v. City of Tampa, Fla.1958, 106 So.2d 407. We have consistently interpreted our consti-

tution to deny this Court authority to entertain an appeal from an order of a district court unless such order either passed upon the validity of a statute or construed a constitutional provision. Evans v. Carroll, Fla.1958, 104 So.2d 375; State ex rel. Emanuel v. Cooper, Fla.1963, 152 So.2d 471.

It is obvious that the district court of appeal's simple per curiam orders denying certiorari from which the subject appeals were taken to this Court neither directly passed on the validity of a statute nor construed a provision of either state or federal constitutions. We therefore had no power, authority, or jurisdiction to act on the appeals.

It is true that F.S. Section 59.45 F.S.A. authorizes us to treat appeals which have been improvidently brought as petitions for certiorari. However, since these decisions of the district court of appeal neither affect a class of state officers nor conflict on the same point of law with a previous decision of this Court or of another court of appeal, they do not fall within our certiorari jurisdiction. Article V, Section 4 Florida Constitution. Therefore, this procedure would avail nothing here.

Because, under the facts of this case, this Court had no authority to review the district court of appeals' orders denying certiorari we entered our order, ex mero motu, dismissing said appeals. In doing so we never reached the merits of the causes. The only jurisdiction we exercised was that necessary to determine our jurisdiction. Therefore, our decision neither reached any federal question which might have been involved in the causes, nor denied the defendant-appellants any federal right properly presented for review. Our decision was based on a valid non-

federal ground, the lack of jurisdiction in this Court to act in these causes.

Since the orders of the district court of appeal involved no question reviewable by this Court either by appeal or certiorari, those orders marked the complete exhaustion of Florida's appellate processes. Defendant-appellants were then entitled to seek relief in the Supreme Court of the United States without coming to this Court. In a somewhat comparable case, Dresner v. City of Tallahassee, Fla.1964, 164 So.2d 208, the defendants did not go far enough in the Florida courts before seeking relief in the federal courts. In this instance it would appear the defendant-appellants went too far in the Florida courts before seeking relief in the federal Supreme Court.

In an unbroken line of decisions the Supreme Court of the United States has held that it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise. Moreover, when the state court, in entering the order attacked in the federal Supreme Court, does so on a non-federal ground, the U. S. Supreme Court has held it was without jurisdiction to review such order. Newman v. Gates, 204 U.S. 89, 27 S.Ct. 220, 51 L.Ed 385 (1907); John v. Paullin, 231 U.S. 583, 34 S.Ct. 178, 58 L.Ed. 381 (1913); Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 37 S.Ct. 188, 61 L.Ed. 476 (1916); Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925); McMaster v. Gould, 276 U.S. 284, 48 S.Ct. 299, 72 L.Ed. 574 (1927); Archerd v. State of Oregon, 290 U.S. 604, 54 S.Ct. 372, 78 L.Ed. 530 (1933); and Wolfe v. State of North Carolina, 364 U.S. 177, 80 S.Ct. 1482,

4 L.Ed.2d 1650 (1960), to name but a few. A classic statement of this view is the following contained in John v. Paullin, 231 U.S. at page 585, 34 S.Ct. at page 178:

> "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev.Stat. § 709; * * * Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."

Nevertheless, if we correctly understand the Mandate of the Supreme Court now before us, that court has reversed our orders dismissing the subject appeals and directed this Court to enter orders vacating the judgments and sentences imposed on the defendant-appellants. To do this will require that we exercise jurisdiction in causes never properly presented to us and in which, under our state constitution, we are powerless to act. Such power can neither be bestowed on this Court by an order of the Supreme Court of the United States nor arrogated to ourselves by our own action. While we venture no remarks on the jurisdiction of the Supreme Court to entertain these causes under the circumstances noted herein, we are constrained by our oaths of office to obey the Florida Constitution, and it prohibits our exercising jurisdiction on

the merits in these causes as these mandates would require.

It is obvious from the foregoing that we cannot obey the Mandate of the Supreme Court of the United States in these causes and at the same time observe the limitations on our authority imposed by our state constitution. This poses a dilemma which we are unable to solve.

For these reasons we respectfully return the Mandates in these causes with a request that the Supreme Court of the United States re-examine its opinions and mandates in light of this opinion and thereafter clarify for this Court the action, if any, which it is required that we take.

It is so ordered.

THORNAL, C. J., THOMAS, ROBERTS, DREW and O'CONNELL, JJ., and JOHNSON, District Court Judge, concur.

ERVIN, J., dissents.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 48

MINNIE E. NASH, PETITIONER

v.

FLORIDA INDUSTRIAL COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

Petitioner challenges the holding of the Flordia Industrial Commission [1] that she was disqualified to receive State unemployment compensation, to which she was otherwise entitled, solely because she had filed unfair labor practice charges with the National Labor Relations Board contesting the lawfulness of her dis-

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[1] The decision of the Commission's Appeals Referee (R. 34-40) was affirmed without opinion by the Commission's Board of Review. A petition for a writ of certiorari to the Commission (R. 49-50) was denied by the Florida District Court of Appeal (R. 58-59). This Court granted a writ of certiorari to the Florida District Court of Appeal (R. 61; 386 U.S. 990).

missal from employment. Because we believe that the decision below conflicts with the National Labor Relations Act (29 U.S.C. 151, *et seq.*) and would seriously impair the work of the National Labor Relations Board in administering that Act, we file this memorandum, *amicus curiae*, urging reversal.

STATEMENT

The relevant facts are not disputed. Petitioner, Minnie Nash, began working for respondent, Stanley Building Specialties Company, a division of respondent Stanley Works, in 1961 or 1962 (R. 14, 35). On January 31, 1965, she joined a strike against the Company called by the Steelworkers Union, the employees' certified bargaining representative, in support of its effort to negotiate a new contract (R. 11-12, 14, 35). The strike failed to close down the Company's operations, and, on March 30, the Union unconditionally offered to return the strikers to their jobs (R. 12, 35). On April 5, the Company agreed to take back some of the strikers, including Nash, and the picketing was terminated (R. 12, 15, 35). On April 6, the Union filed charges with the National Labor Relations Board, alleging that the Company's refusal to reinstate the remaining strikers violated Section 8(a)(3) and (1) of the National Labor Relations Act (R. 12, 36).[2]

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[2] Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." Section 8(a)(1) makes it an unfair labor practice for

Nash returned to work on April 14, 1965 (R. 15, 36). On May 16, she was laid off by the Company due to "slow production", and she immediately applied to the Florida Industrial Commission for unemployment compensation (R. 1, 13, 15, 26) and began receiving such benefits as of that date (R. 18). On June 17, the Union filed charges with the Board on behalf of Nash, alleging that her layoff violated Section 8(a)(3) and (1) of the Act (R. 13, 15, 36).[3] Nash con-

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an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7", which includes the right to strike. The charges filed on April 6, 1965, were subsequently sustained by the Board. See, *infra*, n. 3.

[3] On August 13, 1965, the Board's General Counsel issued a complaint incorporating the charges with respect to Nash and other employees who had been laid-off, as well as the charges previously filed on April 6 with respect to employees whom the Company had refused to reinstate at the end of the strike. The complaint was sustained by the Board on August 8, 1967 (166 NLRB No. 110). The Board held that the strike which had begun on January 31, 1965, was caused by the Company's failure to bargain in good faith as required by Section 8(a)(5) and (1) and was, therefore, an unfair labor practice strike. The Board further held that the Company was obliged to reinstate the strikers at the end of the strike in April 1965 and that it was a violation of Sections 8(a)(3) and (1) subsequently to lay-off reinstated strikers in preference to employees hired as replacements during the strike. The Board ordered the Company to "offer all the strikers, including those who were reinstated but subsequently laid off, full and immediate reinstatement to their prestrike or substantially equivalent jobs with all the rights and benefits they would have accumulated but for the discrimination against them," together with back pay (166 NLRB No. 110, p. 12). Petitions to review the Board's decision and order have been filed in the Courts of Appeals for the Sixth (18100) and the District of Columbia (21193) Circuits.

tinued to receive unemployment compensation until October 5, when the Company voluntarily reemployed her (R. 16, 21, 36).

On November 15, however, the Claims Examiner for the Florida Industrial Commission notified Nash that her claim for unemployment compensation had been reexamined and that, under Section 443.06(4) of the Florida Unemployment Compensation Law, she was "disqualified beginning January 31, 1965, and for the duration of [her] unemployment which is due to the labor dispute at [the Company]." (R. 3, 35.) Section 443.06 provides:

> An individual shall be disqualified for [unemployment] benefits * * * (4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed * * *.

Nash appealed to the Appeals Referee of the Florida Industrial Commission, who found that Nash was entitled to unemployment compensation for the period starting on May 16, when she had been laid off, to June 17, when she filed charges with the Board. As to that period, the Referee's opinion states (R. 39):

> As [Nash] was separated from her job on May 16, 1965, due to "slow production" and did not dispute such separation until June 17, 1965, it should be held that she is qualified for benefits * * * for the period beginning May 16, 1965, to June 17, 1965. Granted, there was a labor dis-

> pute in active progress * * * on May 16, 1965, (such dispute being the labor controversy manifested by the charges with the National Labor Relations Board filed on April 6, 1965, by those workers who were not returned to their jobs and those charges being unresolved and pending * * * on May 16, 1965). But [Nash's] becoming unemployed on May 16, 1965, was not due to this dispute.

On the other hand, the Referee found that Nash became disqualified for compensation on June 17, when she filed charges with the Board contesting her layoff, and remained disqualified until she was reemployed on October 5. The Referee stated (R. 38):

> * * * These charges being filed and being unresolved and pending as of the date [Nash] returned to work constitute a labor dispute in active progress at the premises at which she was last employed between Nash and the [Company]. Consequently, here, it should be deemed that any unemployment [Nash] experienced during the period beginning June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she participated in such dispute. * * * [4]

The Florida Industrial Commission summarily affirmed the Referee's decision (R. 48), and the

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[4] The Referee also found that Nash was disqualified for the period January 31 to April 14, since her unemployment then was due to a strike against the Company in which she participated (R. 36, 38). Nash had neither claimed nor received benefits for that period.

Florida District Court of Appeal denied review (R. 58-59).[5]

DISCUSSION

The Florida unemployment compensation law disqualifies an individual for compensation for any week in which he was unemployed "due to a labor dispute in active progress which exists at the factory * * * at which he * * * was last employed" (Section 443.06(4)). The Florida Industrial Commission has held that the mere filing of unfair labor practice charges with the Labor Board, alleging that employment was terminated in violation of the National Labor Relations Act, creates a disqualifying "labor dispute" within the meaning of the statute. The decision below leaves no doubt that, but for the filing of charges, petitioner would have been entitled to continue receiving benefits. Thus the referee explicitly found that petitioner was qualified for benefits at the time she was laid off because the lay-off was not due to a labor dispute, that she remained qualified up to the date on which charges were filed, but that her unemployment thereafter is "deemed" to be due to a labor dispute (R. 38-39). Although petitioner urges, *inter alia*, that the decision below abridges the privileges and immunities of national citizenship and,

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[5] At each stage of the proceedings below Nash urged that a construction of the Florida Unemployment Compensation Act that would deny her benefits because she authorized the filing of charges with the Board would violate both the supremacy clause of the United States Constitution and the privileges and immunities clause of the Fourteenth Amendment (R. 22-25, 41-42, 50).

hence, violates the Fourteenth Amendment (Pet. 13-15), we confine ourselves here to showing that the decision must be set aside as inconsistent with the National Labor Relations Act.

1. Within broad limits, Florida is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 773. Thus, this Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538;[6] *Auto Workers* v. *O'Brien*, 339 U.S. 454; cf. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation. See *Sherbert* v. *Verner*, 374 U.S. 398; *Speiser* v. *Randall*, 357 U.S. 513; *Terral* v. *Burke Construction Co.*, 257 U.S. 529; Note, *Un-*

[6] In *Hill*, a Florida statute precluding persons from acting as union business agents, unless they first obtained a license from, and met certain qualifications imposed by, the State, was struck down as an undue interference with the employees' right freely to choose their own bargaining representatives, guaranteed by Section 7 of the National Labor Relations Act.

constitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

In the exercise of its powers under the Commerce Clause, Congress has authorized the Labor Board to serve as a tribunal for the prevention of the unfair labor practices proscribed in Section 8 of the National Labor Relations Act and the protection of the rights guaranteed by Section 7 of the Act. The Board's adjudicatory function under Section 10 of the Act is thus an integral part of the congressional labor program. Section 10 presupposes that employees and other individuals are free to file with the Board charges that unions or employers have committed unfair labor practices. Indeed, as the Board has pointed out, the right to file such charges is "indispensable to the administration of the Act." *Local 138, Operating Engineers (Skura)*, 148 NLRB 679, 681. For, although Section 10(a) of the Act empowers the Board to prevent unfair labor practices,[7] and thus to protect the employees' Section 7 rights, Section 10(b) conditions the exercise of that power on the filing of charges;[8] the Board cannot initiate its

[7] Section 10(a) provides, in pertinent part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *."

[8] Section 10(b) provides, in pertinent part: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * *."

own processes. *Hercules Powder Co.* v. *National Labor Relations Board*, 297 F. 2d 424, 433 (C.A. 5). Accordingly, protection of the right to file charges with the Board is a critical prerequisite to the protection of other rights under Section 7 and to the effective discharge of the Board's statutory responsibilities.

The importance to the congressional scheme of protecting employees' freedom of access to the Board's processes is manifested by Section 8(a)(4) of the Act which expressly makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges.[9] Furthermore, it has been held that the right to file charges with the Board is encompassed within the rights guaranteed to employees by Section 7 of the National Labor Relations Act—so that an employer violates Section 8(a)(1), and a union Section 8(b)(1)(A), if either restrains an employee in the exercise of his right to file such charges.[10]

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[9] *John Hancock Mutual Life Insurance Co.* v. *National Labor Relations Board*, 191 F. 2d 483, 485-486 (C.A.D.C.); *National Labor Relations Board* v. *Lamar Creamery Co.*, 246 F. 2d 8, 9-10 (C.A. 5); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 80 (C.A. 2). See also *Local 743, Int. Ass'n of Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 8-9 (C.A. 2) (right to file charges with the Board cannot be contracted away).

[10] *National Labor Relations Board* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (C.A. 3), enforcing 106 NLRB 417, 418 (employer promise of benefit to induce withdrawal of charges); *Gibbs Corp.*, 131 NLRB 955, 956, n. 1, 963, enforced, 308 F. 2d 247 (C.A. 5) (discharge of employee believed to have filed charges); *Roberts* v. *National Labor Relations Board*, 350

2. The right to file charges, which has thus been protected against pressure from employers and unions, is here gravely prejudiced by the ruling of the Florida Industrial Commission. Respondent employer [11] urges that Florida has "merely put Petitioner to an election of rights, remedies and forums" (Stanley Br. in Opp. 23; R. 27). Accepting that characterization, we deny that a State can force such an election where, as here, to do so is to exact a heavy price for the assertion of a federally created right. *Terral* v. *Burke Constr. Co.*, 257 U.S. 529. We think that this is particularly clear where, contrary to the Commission's

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F. 2d 427 (C.A.D.C.), enforcing 148 NLRB 674 (union fine for filing charges); *Local 138, Operating Engineers (Skura)*, 148 NLRB 679 (union fine); *Cannery Workers Union, etc.*, 159 NLRB No. 47, enforcement pending (C.A. 9) (union expulsion).

Cf. *Industrial Union of Marine and Shipbuilding Workers* v. *National Labor Relations Board* (C.A. 3), June 22, 1967, 65 LRRM 2629. Although the court there set aside the Board's finding (see 159 NLRB No. 95) that the union violated Section 8(b)(1)(A) of the Act by expelling an employee for filing charges with the Board without first exhausting internal union procedures, we believe that the court's decision is erroneous and in conflict with *Roberts, supra*. In any event, the court recognized that, in some instances at least, the right to file a charge with the Board is protected by Section 7 of the Act (see 65 LRRM at 2630-2631, 2632). See, also, *Moving Picture Machine Operators* v. *National Labor Relations Board*, (C.A. 3) August 1, 1967, 65 LRRM 3020.

[11] Stanley Building Specialties and its parent firm, The Stanley Works, were parties to the proceedings below. Their interest in the cases lies in the fact that their experience rating under the Florida unemployment compensation system would be adversely affected if petitioner's claim is allowed. See R. 28.

view (Commission Br. in Opp. 14-15), public rather than "purely private" rights are at stake. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362-363.[12]

Where a wage-earner has been laid off for reasons he believes to be invalid under the National Labor Relations Act, the practical significance of the choice with which Florida confronts him is obvious. On the one hand, he can promptly obtain unemployment compensation payments which may tide him over until he can find other employment. Alternatively, he can forego such payments and file charges with the Labor Board, in the hope that, after perhaps protracted litigation, he will be awarded reinstatement with back pay. The choice is thus between the immediate and the eventual, the certain and the conjectural. We cannot doubt that those alternatives are likely to deter resort to the Labor Board. Even though an award of back pay is potentially greater than the payments available under unemployment compensation, unemployed workers of modest means will be hard pressed to pursue the remedy supplied by Congress if the State can require them to forego a present income as the price of doing so.

We note also that the Florida decision provides a potent weapon for combating unionization. An em-

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[12] In *National Licorice, supra,* this Court observed: "The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce * * *." 309 U.S. at 362.

ployer desirous of defeating a union drive might well be encouraged to discharge union adherents, in the expectation that the discharged employee would be more likely to collect unemployment compensation than to file charges with the Board, and that the cost of increased contributions to the State unemployment insurance fund would be small in comparison to the cost of having to deal with a union.[13]

In these circumstances, we see no escape from the conclusion that the decision below seriously impedes freedom of access to the Board, that it materially impairs the capacity of the Board to vindicate important public rights, and that it therefore subverts the policies announced by Congress in the National Labor Relation Act.

3. Finally, we do not believe that the decision below can be justified as necessary for the protection of any State interest of compelling importance to which the federal law must or should defer. Petitioner was denied benefits under a provision of the Florida statute that disqualifies persons whose unemployment is "due to a labor dispute." This statutory disqualification, which appears in the unemployment compensation laws of all the States, has been thought to take account of the voluntary character of unemployment resulting

[13] Numerous states have statutory provisions substantially identical to those of Florida. See Lewis, *Unemployment Compensation in Labor Disputes*, 34-35, 37-38 (Upjohn Institute for Employment Research, 1964). If the Florida interpretation of its law is allowed to stand, there is a danger that these other States will adopt a similar interpretation of their laws.

from labor disputes and the desire of States to remain neutral and refrain from subsidizing either side in labor-management controversies, especially where the payment of benefits to strikers might tend to prolong the work stoppage. See Lewis, *The Concept of "Labor Dispute" in State Unemployment Insurance Laws*, 8 B.C. Ind. & Comm. L. Rev. 29 (1966); Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167 (1945); cf. *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143. We recognize that the application of these principles may raise extremely difficult questions in particular cases. Thus, when employees are thrown out of work through an anticipatory shut down (see *Mortensen* v. *Board of Review*, 21 N.J. 242, 121 A.2d 539) or a lockout (see *In the Matter of North River Logging Co.*, 15 Wash. 2d 204, 130 P.2d 64), it may be doubted that they are voluntarily unemployed, although there may be an element of voluntariness in the underlying controversy. Nevertheless, a State may reasonably determine to provide insurance against unemployment that results from relatively impersonal, cyclical economic forces but not from the intentional use of work stoppages as a weapon in labor-management warfare.

In all events, the resolution of these difficult questions and their bearing on the National Labor Relations Act need not be reached here because the Florida Commission found that petitioner's unemployment was not caused by the strike or the controversy that led to the strike. The Appeals Referee rejected the contention, advanced by respond-

ent employer (R. 25-26), that petitioner's unemployment was caused by the underlying labor dispute: "Granted, there was a labor dispute in active progress at the employer's premises when claimant was separated from her job * * *. But appellant's becoming unemployed on May 16, 1965, was not due to this dispute" (R. 39). On the contrary, the referee found that petitioner's separation from her job was due to "slow production" and that she was entitled to benefits up to June 17, 1965, because she "did not dispute such separation" until that date (R. 39).[14] In short, the circumstance which was deemed to constitute the disqualifying "labor dispute" was the result rather than the cause of her unemployment.[15]

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[14] While the statute on its face would seem to contemplate disqualification only where a labor dispute causes unemployment, the referee appears to have applied an irrebutable presumption to bring the facts found within the statutory language, for he stated that "it should be deemed that any unemployment [petitioner] experienced during the period beginning June 17, 1965 * * * is due to a labor dispute * * *" (R. 38).

[15] As we have noted above (p. 3, n. 3), the Labor Board recently sustained the unfair labor practice charges that had been filed on behalf of Nash and a number of her co-workers. 166 NLRB No. 110 (August 8, 1967). The Board held that it was incumbent upon the employer to lay off employees hired as strike replacements before laying off reinstated strikers and that, had the employer discharged the replacement workers, he would not have had occasion to lay off any of the reinstated strikers. The Board's decision is, of course, irrelevant to the prior decision of the Florida Industrial Commission, which must be evaluated in terms of its own findings of fact. In any event, although the Board, in resolving the dispute that caused the strike, found that Nash was

We submit that, whatever reasons a State may have for denying compensation when unemployment results from a dispute, no reason for disqualification has been suggested—and none can be readily imagined—where the dispute results from the unemployment. The argument presented by the employer (R. 27) that petitioner might enjoy a windfall if she was paid compensation and was subsequently awarded back pay by the Labor Board is wholly without merit since the State is free to recoup compensation payments made during any period covered by a back pay award. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365 n.1. Nor can it be supposed that the State has any valid policy of discouraging the assertion of the rights conferred by the National Labor Relations Act. As this Court said in a different context, "the policy of the federal Act is the prevailing policy in every state." *Testa* v. *Katt*, 330 U.S. 386, 393. We conclude that the denial of unemployment compensation to those who challenge the validity of their dismissal from work (hereby filing charges with the National Labor Relations Board) cannot serve any legitimate State interest; it can only penalize employees for the exercise of rights Congress determined to protect.

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improperly laid off, it was not that dispute, but the one that began with the filing of Nash's charge with the Board, that the Florida Industrial Commission found disqualifying. The Board's adjudication of Nash's charge does not distinguish it, in any relevant sense, from the perfectly common situation where an employee alleges that he was laid off in disregard of his seniority rights or on some mistaken factual premise, such as poor health or absenteeism.

CONCLUSION

For the foregoing reasons, the order of the court below should be reversed, and the case should be remanded to it with instructions to set aside the decision of the Florida Industrial Commission insofar as it denies unemployment compensation to petitioner for filing a charge with the National Labor Relations Board.

Respectfully submitted.

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AUGUST 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MINNIE E. NASH, *Petitioner,*

v.

FLORIDA INDUSTRIAL COMMISSION, *et al.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 48

MINNIE E. NASH, *Petitioner,*

v.

FLORIDA INDUSTRIAL COMMISSION, *et al.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Appeals Referee, Florida Industrial Commission (R. 34) is unreported. The *per curiam* decision of the Florida Unemployment Compensation Board of Review (R. 48) is unreported. The decision of the District Court of Appeal of Florida, Third District (R. 58) is reported at 191 So.2d 99.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, the highest state court in which a decision could be had, was entered on October 11, 1966. The time for filing a petition for writ of certiorari with this court was extended by order of Mr. Justice Black to and including February 8, 1967 (R. 60). The petition for writ of certio-

rari was filed in this Court on February 6, 1967, and was granted on April 10, 1967 (R. 61). This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether a State which disqualifies an otherwise eligible claimant from unemployment benefits solely because she caused a charge to be filed with the National Labor Relations Board thereby abridges her privileges and immunities of United States citizenship, in contravention of the 14th Amendment, Section 2 of the United States Constitution.

2. Whether, consistent with the supremacy clause, Article VI, clause 2 of the United States Constitution, a State may disqualify an otherwise eligible claimant from unemployment benefits solely because she caused a charge to be filed with the National Labor Relations Board.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

U.S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (1965) Section 443.02:

"As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for period of unemployment thus maintaining purchasing power and limiting the serious social consequences of unemployment. The legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police power of the State, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, subject, however, to the specific provisions of this Chapter."

Florida Statutes (1965) Section 443.05:

"An unemployed individual shall be eligible to receive benefits . . ."

Florida Statutes (1965) Section 443.06(4):

"An individual shall be disqualified for benefits:

. . . .

(4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that:

(a) He is not participating in or financing, or directly interested in the labor dispute which is in active progress; provided, however, that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this section; and

(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection be deemed to be a separate factory, establishment or other premises."

STATEMENT OF THE CASE

Petitioner, Minnie Nash, is a 54-year old woman who first went to work for respondent Stanley Building Specialties Co. ("the Company") in 1961 or 1962 (R. 14). The employees of the Company were represented in collective bargaining by United Steelworkers of America ("the Union"), and the latest collective bargaining agreement expired on January 30, 1965 (R. 11). On January 31, 1965, when negotiations for a new agreement reached an impasse, the employees struck (R. 12). Petitioner was an active participant in the strike (R. 12).

On March 30, 1965, the Union advised the Company that the strikers were willing to return to work (R. 12). The Company agreed to take back some of the strikers, including petitioner, and petitioner actually resumed her employment on April 14, 1965 (R. 12, 15). Petitioner made no claim for unemployment benefits covering the period of the strike.

Following her return, petitioner worked from April 14, 1965 through May 16, 1965 (R. 15). On the latter date, she was laid off. The Company gave, as the reason for the layoff, "slow production", i.e., insufficient work to warrant petitioner's retention (R. 13). Petitioner promptly filed an application for unemployment benefits (R. 1), and actually received benefits covering the period from May 16, 1955 through October 5, 1965, the date she was recalled to work by the Company (R. 18, 20, 22). However, on November 15, 1965 she received notice from the Chief of Benefits, Florida Industrial Commission, declaring that her entitlement had been redetermined and that under Section 443.06(4) of the Florida Unemployment Compensation Law she was disqualified for the entire year 1965 because engaged in a "labor dispute" (R. 3). Section 443.06(4) provides in pertinent part:

> An individual shall be disqualified for benefits . . .

> (4) For any week with respect to which the Commission finds that his . . . unemployment is due to a labor dispute in active progress which exists at the factory . . . at which he is or was last employed . . .

Petitioner filed a timely appeal from this disqualification (R. 5), and a hearing was set before an Appeals Referee of the Florida Industrial Commission (R. 8). At the hearing, it was stipulated that on June 17, 1965, petitioner had caused her Union to file a charge with the National Labor Relations Board alleging that her layoff by the Company in May, 1965 was motivated by her Union activities (R. 13). It was further stipulated that that charge remained pending throughout the remainder of her period of layoff (R. 13). Petitioner argued at the hearing that to disqualify her solely because she had caused the NLRB charge to be filed would unconstitutionally abridge her privileges and immunities and would violate the supremacy clause of the federal constitution (R. 23-24).

The Appeals Referee ruled that petitioner was entitled to benefits from May 6 (the date of her layoff) until June 17 (the date the NLRB charges were filed), but that she was properly disqualified for the period between June 17 and October 5 (the date of her recall). The Referee reasoned as follows (R. 38-39):

> "The testimony presented in this instance shows that on June 17, 1965, appellant filed charges with the National Labor Relations Board against the employer because of her separation on May 16, 1965, seeking, among other things, reinstatement on her job and back pay for time which she had lost from work. It has further been shown that these charges were unresolved and pending when claimant was recalled to work by the employer, voluntarily, on October 5, 1965. These charges being filed and being unresolved and pending as of the date appellant returned to work constitute a

labor dispute in active progress at the premises at which she was last employed between claimant and the employer. Consequently, here, it should be deemed that any unemployment appellant experienced during the period beginning June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she participated in such dispute. Therefore it should be held that appellant is disqualified for benefits for the period beginning June 17, 1965 to October 5, 1965.

"As appellant was separated from her job on May 16, 1965, due to 'slow production' and did not dispute such separation until June 17, 1965, it should be held that she is qualified for benefits for all periods for which she filed claims beginning May 16, 1965 to June 17, 1965."[1a]

Petitioner appealed to the Board of Review, Florida Industrial Commission, on the grounds, *inter alia*, that the disqualification for filing a charge with the NLRB unconstitutionally abridged her privileges and immunities, as well as the supremacy clause (R. 41-42). The Board of Review affirmed without opinion (R. 48).

Petitioner then filed a petition for writ of certriorari in

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[1] The decision of the Appeals Referee contains a number of other holdings, which are not involved on this appeal, but which may be briefly summarized:

(1) Petitioner was not eligible for benefits between January 31 and April 14, 1965, because of her active participation in the strike (R. 38). (This holding was gratuitous, for petitioner had never claimed benefits for this period.)

(2) Petitioner was not disqualified between May 16 and June 17, 1965, even though the Union had filed charges with the NLRB on behalf of employees other than petitioner (i.e. those who were not reinstated after the strike), because petitioner's unemployment "was not due to this dispute" (R. 39).

(3) Petitioner was eligible for benefits beginning December 17, 1965, when her unemployment was due to a plant shutdown (R. 39).

the District Court of Appeal of Florida, Third District, again asserting the unconstitutionality of the disqualification (R. 49-50). The petition was denied without opinion (R. 58-59). This being the highest State court in which a decision could be had, petitioner filed her petition in this court.

SUMMARY OF ARGUMENT

Florida has declared that claimants forfeit their right to receive unemployment benefits if they file charges with the National Labor Relations Board challenging the legality of their layoff or discharge. This rule confronts employees with "a choice between the rock and the whirlpool". They must sacrifice either their claims to the NLRB, or their receipt of unemployment benefits. Since few employees can afford to sacrifice the immediate receipt of unemployment benefits for the speculative and distant prospect of receiving backpay should their NLRB charge ultimately be sustained, the likely consequence of Florida's rule will be substantial curtailment of the operation of the National Labor Relations Act in Florida.

Florida's rule unconstitutionally abridges the interests both of affected employees and of the Federal Government. We consider the impact on each.

I. Florida's Rule Abridges the Privileges or Immunities of Affected Employees.

The filing of charges with the NLRB falls within that limited group of privileges or immunities of *national* citizenship protected by the Fourteenth Amendment against State abridgement. It is a means both of informing the Federal Government of a violation of its laws, *In re Quarles,* 158 U.S. 532, 536 (1895), and of seeking the Federal Government's protection, *Slaughter-House Cases,* 83 U.S. 36, 79 (1873).

While Florida has not made it a crime to file charges with the NLRB, nor imposed a tax upon the act of filing such charges, its disqualification of claimants from unemployment benefits is just as effective a deterrent. The Constitution nullifies indirect, as well as direct, interference with the exercise of Constitutional rights. *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963); *Harman* v. *Forssenius,* 380 U.S. 528, 540-41 (1965); *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965). Nor does it matter that the particular method used to nullify the Constitutional right is the withholding of a "privilege" granted by the State to its citizens. It is well established that a state may not condition enjoyment of a privilege upon forbearance from exercising rights guaranteed by the Federal Constitution. *Frost* v. *Railroad Commission of California,* 271 U.S. 583, 593-94 (1926); *Speiser* v. *Randall,* 357 U.S. 513, 518-19 (1958). This principle has been applied to the very "privilege" involved here: receipt of unemployment benefits. *Sherbert* v. *Verner,* 374 U.S. 398, 403-04 (1963).

No compelling state interest justifies the interference with Constitutional rights involved here. Florida's failure to claim any such overriding interest is dispositive, for this Court is "unwilling to assess the importance of an asserted state interest without the views of the state court", *Sherbert* v. *Verner, supra,* at 407. The Company, but not the State, has sought to justify the disqualification as designed to prevent double recoveries, i.e. from both the State and the NLRB. This reasoning would not validate the rule, even if the State were belatedly to embrace it. The State is entitled to recoup unemployment benefits already paid if an employee ultimately recovers backpay from the NLRB, *NLRB* v. *Gullett Gin Co.,* 340 U.S. 361, 365 n.1 (1951). The availability of that procedure amply protects any state interest in avoiding duplicate payments. Moreover, the effect of Florida's rule is to deny unemployment benefits even if the employee loses before the NLRB, and even the Company

has not ventured a theory as to how that consequence vindicates a compelling state interest.

Florida's rule deters the exercise of rights guaranteed by the Federal Constitution, and is not saved by any overriding state interest. It follows that the disqualification of petitioner was unconstitutional.

II. Florida's Rule Contravenes the Supremacy Clause

The National Labor Relations Act depends, for its enforcement, upon the filing of charges by private persons. "[T]he Board, unlike many other Federal regulatory agencies, [is] limited by §10(b) of the Act to the prosecution of violations brought to its attention by aggrieved parties . . ." *Building Material Teamsters* v. *NLRB,* 275 F.2d 909, 913 (2d Cir. 1960). Anything which deters persons from filing charges prevents the NLRB from performing its functions and frustrates enforcement of the NLRA. Because aggrieved employees cannot afford to pay Florida's "price" for filing NLRB charges, flagrant violations of the Act are likely to go unchallenged and unremedied.

Florida may not thus shackle the operations of a Federal agency and the enforcement of a Federal law. The supremacy clause deprives the states of power "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government". *McCulloch* v. *Maryland,* 4 Wheat. 316, 436 (1819). State laws are "void" which "frustrate the purpose of the national legislation, or impair the efficiency of those agencies of the Federal Government to discharge the duties for the performance of which they were created". *Davis* v. *Elmira State Bank,* 161 U.S. 275, 283 (1896).

The supremacy clause prohibits not only State action directed at the Federal instrumentalities themselves, but also State action directed at private persons which has the effect of disrupting the operations of Federal instrumental-

ities. See, e.g., *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922) (state law penalizing corporations which invoked the diversity jurisdiction of the Federal courts); *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963) (state law penalizing carriers who contracted to supply services to Federal agencies at rates below State-prescribed minima); *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963) (state injunction against non-lawyers practicing before the Patent Office).

Since the disqualification here, although directed at individuals, interferes with the operations of a Federal agency and the enforcement of a Federal statute, it contravenes the supremacy clause. As in *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945):

> "[T]he 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that [the Florida statute] as applied here 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'."

ARGUMENT

Florida has established a program to provide benefits to those "unemployed through no fault of their own", Florida Statutes (1965) Sec. 443.02, but disqualifies those whose unemployment is "due to a labor dispute", *Id. Sec.* 443.06(4). In these respects, Florida's practice is identical to that of each of the 50 states. Alone among the states, however, Florida has fashioned a rule, applied in this case, that the filing of a charge with the NLRB is itself a "labor dispute", and disqualifies employees from unemployment benefits solely because they have invoked the aid of the Federal Government.

Petitioner was laid off ostensibly because of "slow production", and she began to receive unemployment benefits. A month after the layoff began, petitioner filed charges with the NLRB alleging that she was actually laid off because of her Union allegiance. Florida, declaring that the NLRB charge "constitute[s] a labor dispute" (R. 38), thereupon disqualified her from receiving further benefits.

The Florida rule confronts employees who believe they have been laid off or discharged illegally with "a choice between the rock and the whirlpool." *Frost* v. *Railroad Commission of California*, 271 U.S. 583, 593 (1926); *Garrity* v. *New Jersey*, 385 U.S. 493, 498 (1967). Only by remaining silent, and foregoing assertion of their claims to the NLRB, will they receive unemployment benefits. (Here, for example, petitioner received benefits for the first month of her layoff, because she "did not dispute [her] separation until June 17" (R. 39)). But if they file a charge with the NLRB protesting the legality of their layoff (or discharge) they will be summarily disqualified from unemployment benefits.

If the Florida rule is permitted to continue, it is not hard to foresee the probable consequences. Few employees can afford to sacrifice the assured, and immediate, receipt of unemployment benefits for the speculative, and in any event distant, prospect of receiving backpay should their NLRB charge ultimately be sustained. Therefore, unemployed workers with legitimate grievances are not going to file NLRB charges; employers will be able to violate the National Labor Relations Act with relative impunity; and the public interests which inhere in the NLRA will not be served. It is no exaggeration to say that the Florida rule, unless reversed, will seriously curtail the operation of the National Labor Relations Act in Florida.

We believe the Florida rule unconstitutionally abridges the interests both of the affected employees and of the Federal Government. As we show in Part I herein, the rule abridges employees' privileges and immunities of national

citizenship, by imposing an unlawful condition on the exercise of such privileges and immunities. And, as we show in Part II, the rule, by its resultant interference with the administration of the National Labor Relations Act, runs afoul of the supremacy clause.

I—FLORIDA'S DISQUALIFICATION OF CLAIMANTS SOLELY BECAUSE THEY FILE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CONSTITUTES AN ABRIDGEMENT OF PRIVILEGES OR IMMUNITIES IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. Filing A Charge With the National Labor Relations Board Is a "Privilege or Immunity" of National Citizenship.

The Fourteenth Amendment declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This clause has been sparingly applied, due to an early holding that it is inapplicable to those privileges and immunities which arise from *State* citizenship. *Slaughter-House Cases,* 83 U.S. 36 (1873). Nevertheless, it is clear that the filing of charges with the NLRB falls within that limited group of privileges or immunities of *national* citizenship which have always been recognized as protected by the clause.

In *Slaughter-House Cases, supra,* it was declared that the Fourteenth Amendment protects against State abridgement those privileges and immunities "which owe their existence to the Federal Government, its national character, its Constitution, or its laws." 83 U.S. at 79. The Court's enumeration of privileges and immunities protected by the Fourteenth Amendment included "the right . . . to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, . . . to engage in administering its functions" *Ibid.*

Thereafter, in *In re Quarles,* 158 U.S. 532 (1895), the Court squarely held that one of the privileges or immunities of national citizenship is the right to inform the United States authorities of violations of its laws:

> "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. *Logan* v. *United States,* 144 U.S. 294. Both are, within the concise definition of the Chief Justice in an earlier case, 'privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.' . . ." 158 U.S. at 536.

See also, *Twining* v. *New Jersey,* 211 U.S. 78, 97 (1908); *United States* v. *Guest,* 383 U.S. 745, 771-72 (1966) (opinion of Mr. Justice Harlan, concurring in part and dissenting in part).

Clearly, the filing of charges with the National Labor Relations Board, alleging that an employer has violated the National Labor Relations Act, is a privilege or immunity of national citizenship. It is a means both of informing the Federal Government of a violation of its laws, *In re Quarles, supra,* and of seeking the Federal Government's protection, *Slaughter-House Cases, supra.* Moreover, since the NLRB may not initiate its own proceedings, and is dependent upon the filing of charges by private persons,[2] the person who files such charges is in a real sense "engaged in administering its functions," *Slaughter-House Cases, supra.*

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[2]"[T]he Board, unlike many other Federal regulatory agencies [is] limited by § 10(b) of the Act to the prosecution of violations brought to its attention by aggrieved parties . . ." *Building Material Teamsters* v. *NLRB,* 275 F.2d 909, 913 (2d Cir. 1960) (Friendly, J.).

B. Disqualification from State Benefits Solely for Exercising a Privilege or Immunity of National Citizenship Constitutes "Abridgement" of that Privilege or Immunity.

Florida has not made it a crime to file charges with the NLRB, nor has it imposed a direct tax upon the act of filing such a charge. But its disqualification of claimants from unemployment benefits will be just as effective in deterring the filing of charges. The Constitution "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed," *Harman* v. *Forssenius,* 380 U.S. 528, 540-41 (1965). Indirect exactions "almost certain to have a deterrent effect" on the exercise of Constitutional rights are forbidden. *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). The disqualification imposed by Florida here is a form of indirect interference with the exercise of Constitutional rights falling within this prohibited category.

We may assume that Florida is free to adopt, or not to adopt, a system of unemployment benefits, as it chooses, and that receipt of unemployment benefits is a "privilege" which the State is not constitutionally required to provide. Nevertheless, it is well settled that the State may not condition enjoyment of that privilege upon forbearance from exercising a right guaranteed by the Federal Constitution. *Frost* v. *Railroad Commission of California,* 271 U.S. 583, 593-94 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees

> embedded in the Constitution of the United States may thus be manipulated out of existence."

This Court has applied this principle in a number of settings. For example, in *Speiser* v. *Randall,* 357 U.S. 513 (1958), the State had conditioned receipt of a tax exemption upon the signing of an oath that the taxpayer had not exercised certain First Amendment rights. This Court struck down utilization of the oath as a condition to receipt of the tax exemption, declaring:

> "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech . . . [T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 518-19.

See also, *Western Union Telegraph Co.* v. *Kansas,* 216 U.S. 1 (1910); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and cases cited therein at p. 500.

Indeed, in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), this Court applied this constitutional principle to the very "privilege" involved here: receipt of unemployment benefits. South Carolina administered its unemployment system to disqualify those unavailable for Saturday work. The effect of this rule was to disqualify automatically those who, for religious reasons, would not work on Saturdays. This Court struck down the rule as an unconstitutional burden on the free exercise of religion by Sabbatarians:

> "We first turn to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it clear that it does. In a sense the consequences of such a disqualification to religious practices and principles may be only an indirect result of welfare legislation within the

State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect' . . . Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine . . .

"Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment benefits are not appellant's 'right' but merely a 'privilege'. It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege [citing cases]." 374 U.S. at 403-04.

It should be apparent that the abridgement in the instant case is far more direct than that in *Sherbert*. South Carolina's disqualification was not aimed at Sabattarians; it was a general rule disqualifying those who turned down available employment. The vice in South Carolina's rule was that it was so broad as to include Sabbatarians in its sweep. Here, by contrast, the Florida rule is directed specifically at the filing of charges with the NLRB. *A fortiori*, the holding in *Sherbert* is applicable to Florida's rule here.

There can be no doubt that the effect of Florida's rule is to deter the filing of charges with the NLRB. It follows

that the rule abridges privileges or immunities of national citizenship.

C. The Disqualification Cannot Be Upheld as Serving a Compelling State Interest.

This Court has recognized that, in certain circumstances, state laws interfering with the exercise of constitutional rights may be upheld as serving compelling state interests. See, e.g., *Braunfield* v. *Brown,* 366 U.S. 599 (1961). We question, however, whether that principle can ever be applicable to the constitutional right to communicate with the Federal Government. We would think that the very essence of the principles inherent in the supremacy clause is that state interests, no matter how compelling, must bow to the unimpeded administration of Federal laws. In any event, it is clear that no compelling state interest justifies the Florida rule involved here, even if there is room for application of that principle to this type of Constitutional right.

At the outset, we note that at no point in the course of this litigation has the State suggested that there is a compelling interest which justifies interference with petitioner's constitutional rights. The absence of any such claim or ruling below is dispositive, for this Court has declared itself "unwilling to assess the importance of an asserted state interest without the views of the state court." *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963).

Nor can we conceive of any state interest which might be advanced as compelling. Whatever its views on the desirability of employees filing charges with the NLRB, the State may not defend its rule as "frankly aimed at the suppression of dangerous ideas" cf. *American Communications Association* v. *Douds,* 339 U.S. 382, 402 (1950), yet suppression, whether or not intended, appears to be the only significant consequence of the rule.

The Company, but not the State, has sought to justify the disqualification as designed to prevent double recoveries

(R. 27). It argues that an employee who receives unemployment benefits, and then wins a backpay award from the NLRB, is paid twice for the same period of unemployment (*Ibid*). This reasoning would not validate the rule, even if the State were belatedly to embrace it. This Court has recognized the right of the State to recoup unemployment benefits already paid if an employee ultimately recovers backpay from the NLRB, *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365 n.1 (1951), and the availability of that procedure amply protects any state interest in avoiding duplicative payments. While, to be sure, it is somewhat more cumbersome to recoup payments than to deny them altogether, this slight inconvenience is not in the class of "gravest abuses, endangering paramount interests" warranting infringement of constitutional rights. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); *Sherbert* v. *Verner, supra*, 374 U.S. at 406-07.

Here, Florida denies unemployment benefits without regard to whether the claimant ultimately wins or loses before the NLRB. Thus, the claimant may wind up with no recovery at all, and even the Company has not ventured a theory as to how that consequence vindicates a compelling state interest.[4]

Moreover, Florida has demonstrated that it does not con-

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[4] The same constitutional defect would inhere, however, even if the Florida rule were more sophisticated. Thus, if Florida announced that it would *suspend* the payment of benefits, and pay them only if the claimant lost before the NLRB, the danger of non-recovery would be averted. But the infringement on constitutional rights would be the same. The whole purpose of unemployment benefits is to compensate *during the period of unemployment* (see Florida Statutes (1965), Sec. 443.02). Suspension of benefits would be as effective as outright denial in deterring the filing of NLRB charges, for the unemployed cannot afford to postpone the receipt of benefits.

In short, the recoupment procedure authorized in *Gullet Gin* adequately protects any state interest in preventing double recovery, and accordingly no infringement upon constitutional rights can be excused on the ground that it is designed to prevent double recovery.

sider the danger of double recovery worthy of concern. In the sixteen years since *Gullet Gin* was decided, Florida has adopted no procedure for recoupment of benefits paid to those ultimately receiving backpay from the NLRB,[5] although expressly authorized by this Court to do so, 340 U.S. at 365 n.1. It should be apparent that the incidences of double recovery are so few, when compared to the magnitude of the State unemployment system, as to be *de minimis*, cf. *Sherbert* v. *Verner*, 374 U.S. at 407-08, and Florida has so regarded them.

It follows that the disqualification of petitioner abridged her privileges and immunities of national citizenship, and that the Florida rule must be declared unconstitutional.

II—FLORIDA'S DISQUALIFICATION OF CLAIMANTS SOLELY BECAUSE THEY FILE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CONTRAVENES THE SUPREMACY CLAUSE.

Thus far, we have examined the Florida rule from the standpoint of its impact upon employees, and we have shown that it unconstitutionally abridges their privileges and immunities. We now discuss the impact of the rule upon the operations of the Federal Government itself. We shall show that, because the rule seriously disrupts the operations of a Federal administrative agency and the enforcement of a Federal law, it runs afoul of the supremacy clause, Article VI, Clause 2 of the Federal Constitution.

The National Labor Relations Act depends, for its enforcement, upon the filing of charges by private persons. "The statutory machinery begins with the filing of an unfair labor practice charge by a private person", *United Auto Workers* v. *Scofield*, 382 U.S. 205, 219 (1965). "[T]he Board, unlike many other Federal regulatory agencies, [is]

[5] See Florida Statutes (1965), Sec. 443.07(6), listing the only situations in which recoupment is allowed. Recovery of backpay from the NLRB is not included in the list.

limited by §10(b) of the Act to the prosecution of violations brought to its attention by aggrieved parties . . ." *Building Material Teamsters* v. *NLRB*, 275 F.2d 909, 913 (2d Cir. 1960) (Friendly, J.). Congress' concern that persons not be deterred from filing charges is reflected in Section 8(a)(4) of the Act, 29 U.S.C. §158(a)(4), which makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges . . ."

The NLRB is "a public agency acting in the public interest", *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). Anything which deters persons from filing charges prevents the NLRB from performing its functions and frustrates enforcement of the NLRA. Because aggrieved employees cannot afford to pay Florida's "price" for filing NLRB charges, flagrant violations of the Act are likely to go unchallenged and unremedied.

Florida may not thus shackle the operations of a Federal agency and the enforcement of a Federal law. The governing principle was first enunciated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat, 316, 436 (1819):

> "[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

The fate of State action interfering with the Federal Government's operations was decreed in *McCulloch* at 427:

> "It is of the very essence of supremacy to remove all obstacles to its action within its sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

The freedom of Federal agencies and Federal legislation from State interference was restated with undiminished vigor in *Davis* v. *Elmira State Bank*, 161 U.S. 275. 283 (1896):

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation, or impairs the efficiency of those agencies of the Federal government to discharge the duties for the performance of which they were created.* These principles are axiomatic, and are sanctioned by the repeated adjudications of this court" (Emphasis supplied).

These early "supremacy" decisions involved State action directed against the Federal instrumentalities themselves, while our case involves State action directed against private persons. This Court has recognized, however, that the operations of the Federal Government may be shackled by State action directed at private persons. Where the Federal Government has prescribed a role for private persons in the effectuation of a Federal function, and a State attempts to deter persons from performing that function, the State's action has been struck down as contravening the supremacy clause. For example, this Court has nullified, under the supremacy clause, an Arkansas statute penalizing corporations which invoked the diversity jurisdiction of the Federal courts, *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922); a Georgia law penalizing carriers who contracted to supply services to Federal agencies at rates below State-prescribed minima, *United States* v. *Georgia Public Service*

Comm'n, 371 U.S. 285 (1963); and a Florida law enjoining non-lawyers from practicing before the Patent Office, *Sperry* v. *Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

Since the disqualification here, although directed at individuals, interferes with the operations of a Federal agency and the enforcement of a Federal statute, it contravenes the supremacy clause. As this Court said in *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945), with respect to another Florida statute found to undermine the National Labor Relations Act:

> "[T]he 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that [the Florida statute] as applied here 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' . . .
>
> "Our holding is that the NLRA and . . . the Florida Act as here applied cannot 'move freely within the orbits of their respective purposes without impinging upon one another.' Accordingly the case is reversed

CONCLUSION

For the reasons set forth hereinabove, Florida's disqualification of petitioner from receipt of unemployment benefits, solely because she caused a charge to be filed with the National Labor Relations Board, unconstitutionally abridges

her privileges and immunities of national citizenship, and contravenes the supremacy clause. Accordingly, the decision below must be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 48

October Term, 1967

MINNIE E. NASH, *Petitioner*

v.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS AND STANLEY BUILDING SPECIALTIES, *Respondents*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR RESPONDENTS, THE STANLEY WORKS AND STANLEY BUILDING SPECIALTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 48

October Term, 1967

MINNIE E. NASH, *Petitioner*

v.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS AND STANLEY BUILDING SPECIALTIES, *Respondents*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR RESPONDENTS, THE STANLEY WORKS AND STANLEY BUILDING SPECIALTIES

STATEMENT OF THE CASE

The Stanley Works and Stanley Building Specialties, hereinafter referred to as "Respondents", accept the presentation of Petitioner in her brief of those sections dealing

with OPINIONS BELOW, JURISDICTION, QUESTIONS PRESENTED and CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. Respondents further adopt Petitioner's STATEMENT OF THE CASE except as indicated below.

On April 6, 1965, the union involved filed on behalf of Petitioner unfair labor practice charges against Respondents claiming that Respondents' refusal to allow some 50 striking employees, including Petitioner, to return to work was in violation of the National Labor Relations Act, as amended. These charges were pending before and unresolved by the National Labor Relations Board at all material times (R.12,19).

On April 14, Petitioner was recalled to work and then subsequently was laid off for economic reasons on May 14, 1965. On May 17, 1965, Petitioner applied for unemployment compensation benefits under Florida Statutes, Chapter 443 (R.1,17).

In addition to commencing the above action before the Florida Industrial Commission, Petitioner, on or about June 17, 1965, caused an additional unfair labor practice charge to be filed with the National Labor Relations Board claiming that her layoff was for union activity and, therefore, unlawful, and that she was entitled to immediate reinstatement with back pay for all wages lost (R.12).

No resolution on Petitioner's consolidated unfair labor practice charges was made by the National Labor Relations Board, but the Board of Review of the Florida Industrial Commission, in affirming the decision of the

Appeals Referee, found that Petitioner, by filing the unresolved unfair labor practice charges, dated June 17, was involved in an active labor dispute with Respondents and was not entitled to unemployment compensation during the period from June 17 to October 5, 1965 (R.33,40).

Thereafter, Petitioner filed a Petition for Certiorari in the District Court of Appeal of Florida, Third District, which petition was denied without opinion (R.49-50,58-59).

ARGUMENT

I.

THE DECISION OF THE BOARD OF REVIEW OF THE FLORIDA INDUSTRIAL COMMISSION AFFIRMING THE DISQUALIFICATION OF PETITIONER FROM RECEIVING UNEMPLOYMENT COMPENSATION BENEFITS BECAUSE SHE HAD FILED UNRESOLVED UNFAIR LABOR PRACTICE CHARGES WITH THE NATIONAL LABOR RELATIONS BOARD CHALLENGING HER LAYOFF DOES NOT CONSTITUTE AN ABRIDGMENT OF PETITIONER'S PRIVILEGES OR IMMUNITIES IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Petitioner argues that the filing of charges with the National Labor Relations Board alleging an employer violation of the National Labor Relations Act is a privilege or immunity of national citizenship and that for Florida to disqualify her from receiving unemployment benefits for filing unfair labor practice charges is an

abridgment of her privileges and immunities because she is required to forebear exercising a right guaranteed by the Federal Constitution and such requirement does not serve a compelling state interest. An analysis of Petitioner's reasoning and supporting authorities clearly shows that her argument is both faulty and illogical and will not support the position she takes before this Court.

A. Filing an unfair labor practice charge is not a privilege and immunity of national citizenship.

Petitioner in her brief contends that the filing of unfair labor practice charges is a privilege or immunity of national citizenship because it is a means both of informing the Federal Government of a violation of its laws and of seeking the Federal Government's protection (Petitioner's Brief, P. 14). To support this conclusion she relies upon *Slaughter-House Cases*, 83 U.S. 36(1873) and *In re Quarles*, 158 U.S. 532 (1895). Neither of these cases is in point.[1]

---

[1]The *Slaughter-House Cases, supra,* involved a charter creating a slaughter-house company and certain powers of the company conferred by the charter. The butchers of New Orleans attacked the charter and the powers conferred thereunder. The Supreme Court held that the privileges and immunities relied upon by the butchers were those belonging to citizens of the state and as such, were left to the state governments for protection. The Court excused itself from defining the privileges and immunities of citizens of the United States which no state can abridge, but did suggest that one has the right "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its function." (*Slaughter-House Cases, supra,* at P. 79). Respondent submits that the type of governmental rights referred to above are those rights guaranteed to all citizens of the United States. Since the

Both the *Slaughter-House* and the *Quarles* decision deal with rights of all citizens of the United States and rights that are exercisable by all citizens of the United States. Such rights were the only rights proposed by Congress in the amendments and such were the only rights ratified by the various state legislatures. *Slaughter-House Cases, supra.*

A brief examination of the National Labor Relations Act, as amended, clearly shows that no rights of national citizenship are involved nor did Congress intend that the filing of an unfair labor practice charge be a right of all citizens of the United States. The Act offers protection to "employees", *National Labor Relations Act,* Section 2(3), 29 U.S.C. § 152(3). The term "employees" refers to employees employed by an employer, and the employer must be found to be engaged in interstate commerce before the charge will be entertained. Therefore, some citizens and some non-citizens are protected by the Act and

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right to file an unfair labor practice charge is not a right enjoyed by all citizens of the United States, as will hereinafter be shown, the *Slaughter-House Cases, supra,* do not support Petitioner's position.

In the case of *In re Quarles,* 158 U.S. 532(1895), the Supreme Court approved the applicability of Section 5508 of the Revised Statutes for the punishment of a criminal conspiracy against a certain informer by those persons whom he informed against concerning their criminal violation of the Internal Revenue Laws of the United States. This Court therein emphasized both the duty of private citizens to furnish information to assist peace officers in prosecution of breaches of the peace of the United States and the rights of such citizens to have their information treated as a confidential and privileged communication and their persons protected from any conspiracy to injure, oppress, threaten or intimidate them.

Here again the right involved in *Quarles, supra,* is a right enjoyed by every national citizen. Therefore, it is distinguishable on that basis. Furthermore, the present case involves essentially private rights, namely, Petitioner's reinstatement to her job with back pay. No public duty relative to criminal laws of the United States is involved.

some citizens are not afforded its protection because certainly not all citizens are employees of employers engaged in interstate commerce.

Furthermore, the privileges and immunities guaranty in the Fourteenth Amendment was also intended to prevent or limit the powers of a state to exclude citizens of other states from the privileges granted to its own citizens *McPherson v. Blacker* 146 U.S.1(1892). Since Florida's disqualification from unemployment benefits under attack by Petitioner deals with "individuals" and not "citizens", "Florida residents" or "non-residents of Florida", there is additional reason for not applying privileges and immunities to the present case.

Respondents state that any decision based upon privileges and immunities, whether favorable or adverse, would be erroneous.

B. Disqualification from state unemployment benefits for filing an unfair labor practice charge is not arguably violative of the privilege and immunity clause of the Fourteenth Amendment.

After erroneously concluding that the right to file an unfair labor practice charge is a privilege and immunity of national citizenship, Petitioner next argues that Florida's rule disqualifying claimants from unemployment benefits if they do file unfair labor practice charges constitutes an abridgement of privileges and immunities of national citizenship in violation of the Fourteenth Amend-

ment.[2] Petitioner's argument in this regard must also fail.

Of course, if the right to file an unfair labor practice charge is not a right of national citizenship, then certainly there can be no violation of the privileges and immunities

[2]Petitioner cites numerous cases in this regard, none of which support her contention that the right to file an unfair labor practice is a privilege or immunity of national citizenship, and none of which lends support to her erroneous conclusion that the Florida rule of disqualification from benefits for filing such a charge abridges her privileges and immunities.

Petitioner cites the case of *Harmond v. Forssenieus*, 380 U.S. 528 (1965, which involved a Virginia statute that was held to violate the Twenty-Fourth Amendment because it imposed a material requirement upon citizens before they could vote in a federal election.

Next the case of *Lamont v. Postmaster General*, 381 U.S. 301 (1965) was cited. This case involved an Act of Congress which required the addressee of certain mail to request in writing that it be delivered, and this court found such requirement of the Federal Act to violate the First Amendment.

The case of *Frost v. Railroad Commission of California*, 271 U.S. 583 (1926), relied upon by Petitioner, involved a state statute requiring carriers to dedicate their property to the business of public transporation and subject themselves to the duties and burdens imposed by the Act upon common carriers. This was held to be violative of the due process clause of the Fourteenth Amendment.

Petitioner also cited *Speiser v. Randall*, 357 U.S. 513 (1958) which involved a state statute imposing the burden of proof upon the taxpayer to the effect that he did not advocate the overthrow of the government by force and violence before he could receive certain tax exemptions. This likewise was held to be violative of the due process clause.

Petitioner relies heavily upon the case of *Sherbert v. Verner*, 374 U.S. 398 (1963), apparently because this case involves an unemployment compensation statute of the State of South Carolina under which the claimant was disqualified from receiving benefits because she would not work on Saturday. This court held that such disqualification was unconstitutional since the claimant was a member of the Seventh-day Adventist Church and such a rule violated her First and Fourteenth Amendment rights.

Respondents contend that none of these cases support the position of Petitioner since they do not involve cases dealing with rights of national citizenship, and since the Fourteenth Amendment was not intended to increase the number of rights of national citizenship.

clause of the Fourteenth Amendment. That such is clearly the case has already been adequately demonstrated herein. However, since Petitioner attempts to draw support from the cases hereinabove distinguished in Footnote 2, Respondents feel it necessary to briefly comment on Petitioner's error in this regard.

Petitioner is apparently under the mistaken belief that the privileges and immunities clause of the Fourteenth Amendment makes all of the provisions contained in the First Ten Amendments and, in turn, all of the provisions contained in Federal statutes, operative within the states on the grounds that the rights contained therein, are, by virtue of the Fourteenth Amendment, to be regarded as privileges or immunities of citizens of the United States. The case of *Maxwell v. Dow*, 176 U.S. 581 (1900) clearly points out that such position is erroneous and untenable.

In that case the defendant claimed that to prosecute him by information rather than indictment and to try him with a jury of only eight persons instead of twelve abridged his privileges and immunities as a citizen of the United States under the Fifth and Sixth Amendments of the Constitution, and also violated section 1 of the Fourteenth Amendment. The Supreme Court rejected these contentions and said:

> "Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a

citizen of the United States, but they are secured to all persons as against the Federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgement by the states of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen.

* * * *

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgement of the privileges or immunities of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the Federal government, whether citizen or not.

* * * *

> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies." *Supra.*

Therefore, since the right to file an unfair labor practice charge does not arise by virtue of national citizenship, the Florida rule of disqualification from unemployment benefits cannot possibly constitute an abridgement of Petitioner's privileges and immunities guaranteed by the Fourteenth Amendment, and, if the Florida rule is to be found unconstitutional, other grounds must be advanced by Petitioner.

II.

THE DECISION OF THE BOARD OF REVIEW DISQUALIFYING PETITIONER FROM RECEIVING UNEMPLOYMENT BENEFITS HAS WARRANT IN THE RECORD AND REASONABLE BASIS IN LAW AND DOES NOT CONSTITUTE AN UNREASONABLE INFRINGEMENT UPON THE NATIONAL LABOR RELATIONS ACT, AND, THEREFORE, DOES NOT CONTRAVENE THE SUPREMACY CLAUSE.

In the last portion of her brief, Petitioner asserts that the decision of the Florida Board of Review seriously disrupts the operation of the National Labor Relations Board and the enforcement of the National Labor Relations Act, as amended, and therefore, runs afowl of the supremacy clause, Article VI, Clause 2 of the Federal Constitution. In support of her position in this regard,

Petitioner relies primarily upon the cases of *Davis v. Elmira State Bank*, 161 U.S. 275 (1895), and *Hill v. Florida*, 325 U.S. 538 (1945).

The *Davis* case, *supra*, involved two statutes, one federal and one state, both relating to insolvent banks and the right of preference concerning distribution of the remaining assets of the bank. The statutes were in direct conflict and this Court held that the federal statute prevailed.

In the *Hill* case, *supra*, this Court determined that a Florida statute imposing certain conditions upon unions and punishment for failure to comply with these conditions interfered with the type of collective bargaining Congress had authorized and was, therefore, repugnant to the National Labor Relations Act. Since both Acts could not "move freely within the orbit of their respective purposes without infringing upon one another", the Florida law was declared unconstitutional, *supra* at 543.

Respondents contend that neither of these decisions is helpful in furnishing guide lines in the present case. Rather, the enquiry here should be whether or not the ruling of the Board of Review frustrates the purpose of the National Labor Relations Act, as amended, to the extent that it should be struck down as unconstitutional and violative of the supremacy clause.

It is clear that a state has the authority to establish unemployment compensation acts by legislative enactment. In so doing, a state legislature has the power to determine the scope of the act and it need not occupy the whole field of unemployment. A legislature may lay down definitions

and tests to be applied in the administration of the statute, and these functions fall within a state's police power. 81 *C.J.S.* Social Security and Public Welfare, § 81.

> "In determining the validity of such legislation it is not for the court to determine the merits of the law as enacted by the legislature, or, provided the act has a legitimate end and the means are reasonably related to that end, to question the wisdom or workability of the scheme set up by the legislature, or to say that some plan other than that adopted by the legislature would be preferable, or that experience might demonstrate the economic fallacy of the particular plan promulgated."

> "Questions as to the manner of the operation of the act are legislative questions and ordinarily are not within the power of the court to consider and determining the validity of the act." *Id.* at 121.

In *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143 (1946), this Court clarified the state's authority in interpreting and applying its unemployment compensation act, and the scope of appellate review of such state determinations.

> "Here, as in *National Labor Relations Board v. Hearst Publications, Inc.*, 1944, 322 U.S. 111, 131, 64 S.Ct. 851, 860, 861, 88 L. Ed. 1170, the question presented "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute

must determine it initially.' To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'. *(Citations omitted)*

Applying these tests, we are unable to say that the Commission's construction was irrational or without support in the record. The Commission apparently viewed a dispute as 'active' during the continuance of a work stoppage induced by a labor dispute. That agency might reasonably conclude that the unemployment resulting from such work stoppage is not of the 'involuntary' nature which the statute was designed to alleviate, as indicated by the statement of public policy incorporated in the Act by the Territorial Legislature. We see nothing in such a view to require our substituting a different construction from that made by the Commission entrusted with the responsibility of administering the statute'." *Id.* at 250, 251.

The North Carolina Supreme Court in *In Re Abernathy*, 130 S.E.2d 292 (N.C.Sup.1963), *cert. den.,app.dism.* 84 S.Ct. 274, 375 U.S. 161 (1963) stated:

" 'When the subject lies within the police power the the state, debatable questions as to reasonable-

> ness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome,' *Sproles v. Binford*, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed.1167; .... 'Legislative bodies may distinguish, select, and classify objects of legislation. * * * They may prescribe different regulations for different classes * * *. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination.' ...; see also, ...; *Magoun v. Ill. Trust & Savings Bank*, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037;...; *Steward & Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279.' The unemployment insurance acts of the states contain certain worker disqualifications, among them, (1) discharge for misconduct, (2) refusal to accept other suitable employment, (3) participation in a strike. The power of the legislature to provide these disqualifications is not challenged. Further disqualifications contained in the 1961 amendment involves a question of degree and not of principle.' " *Id.* at 299.[3]

With these cases in mind, Respondents would state that the right to strike and/or picket are probably the working man's most basic tools in the process of self help in the effectuation of the rights guaranteed him under

[3]The Court in *Abernathy* held that the North Carolina Court's interpretation of its Unemployment Compensation Act, which is closely akin to Florida's, so that flight engineers who refused to cross picket lines at Employer's North Carolina operation were not eligible to receive unemployment compensation, was constitutional when tested by the Fourteenth Amendment of the Constitution of the United States.

Section 7 of the National Labor Relations Act, as amended. The right to engage in peaceful picketing has been equated to freedom of speech protected from unlawful abridgment by a state by the Fourteenth Amendment to the United States Constitution. *Thornhill v. State of Alabama*, 60 S.Ct. 736, 310 U.S. 88 (1940); *A.F.L. v. Swing*, 61 S.Ct. 568, 312 U.S. 321 (1940); *Bakery and Pastry Drivers & Helpers Local 802 International Brotherhood of Teamsters v. Wohl*, 62 S. Ct. 816, 315 U.S. 769 (1942); *Johnson v. White Swan Laundry*, 41 So.2d 874 (Fla.Sup.Ct. 1949). Further, there is no doubt but that the right to strike, so long as such right is exercised in a lawful manner, is entitled to protection under the Fourteenth Amendment from unreasonable infringement by a state. 16 *C.J.S.* Const. Law §213.

Although federal recognition and protection of such rights is generally accepted, the validity of state unemployment compensation acts which deny employees unemployment compensation benefits when their unemployment is due to participation in striking and/or picketing is almost universally recognized.[4]

By analogy, if a state may hold that an employee who is unemployed because he is participating in these constitutional freedoms may be denied unemployment benefits, it

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[4]*In Re Abernathy, supra; Aragon, supra; The Ruberiod Co. v. Unempl.* Ins. App., 50 LRRM 85 (Calif. Dist.Ct. App. 1962); *Gillan v. Admr. Unempl. Comp. Act.* 50 LRRM 86 (1962); *Achenbach v. Review Bd. of Indiana Empl. Comm'n. Div.*, 49 LRRM 112 (Ind.Sup. Ct. 1962); *Weltner of Kansas Empl. Sec. Bd. of Rev.*, 53 LRRM 98 (Kansas Sup.Ct. 1963); *Johnson v. Kentucky Unempl. Ins. Comm'n.*, 53 LRRM 100 (Ky.Ct. App. 1963); *Wheeler v. Director of Div. of Empl. Sec.* 56 LRRM 148 (Mass. Sup. Jud. Ct. 1964); *Weiss v. Klein Markets, Inc.*, 47 LRRM 90 (Minn. Sup. Ct. 1961); *O'Dell v. Division of Empl. Sec.*, 55 LRRM 131 (Mo. Sup.Ct. 1964); *Marczi v. Bd. of Education*, 46 LRRM 115 (N.J. Sup.Ct. App. Div. 1960), *ad infinitum*

follows that a state may hold that an employee may be denied unemployment compensation benefits because he filed an unfair labor practice charge with the National Labor Relations Board. Of course this is true only so long as such disqualification is applied uniformly to all persons similarly situated. Respondents submit that there is no reason to afford the "right" to file such charges more protection than the recognized right to strike and/or picket.

Such conclusion is further buttressed by the fact that the right to file unfair labor practice charges is created and protected by the same federal law that gives employees the right to strike and/or picket, *i.e.* The National Labor Relations Act, as amended. Consequently, Respondents contend that if a state may constitutionally deny unemployment compensation benefits to an employee who is engaged in striking and/or picketing, the State of Florida may constitutionally deny Petitioner unemployment compensation because she filed an unfair labor practice charge with the National Labor Relations Board.[5]

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[5]That the State of Florida may interpret Petitioner's unemployment to be due to a labor dispute in active progress because she filed an unfair labor practice charge with the National Labor Relations Board, and that such interpretation has "warrant in the record" and a "rational basis in the law", is apparent. In *Meyer v. Florida Industrial Commission*, 117 So.2d 216 (1960), the District Court of Appeal of Florida, Second District, said at page 219:

"As we understand the term "labor dispute" it includes any controversy between employer and employee concerning wages, hours, working conditions or terms of employment. When once a "labor dispute" begins, it remains in 'active progress' until it is finally settled, terminated or completely abandoned. *Unemployment Compensation Commissioner of Territory of Alaska v. Aragon*, 329, U.S. 143 (other citations omitted). "In the present case the 'active progress' of the labor dispute did not terminate on September 9, 1958, when the Union called off the strike, removed the picket line, and voted to release the petitioner [Meyer] for re-employment, for this action by the union merely amounted to our abandonment of certain activities which were being employed by the union to force the employer to accede to the

The underlying reasons for allowing claimants to be disqualified from receiving unemployment benefits when they are engaged in strikes is to allow the state to remain neutral in such a labor dispute and not favor either party by financial aid and to prevent the benefits disbursed out of funds accumulated through employer contributions from being, in effect, an employer subsidization of the unemployed employee.

Certainly there is no good reason for advancing these principles in cases involving strikes and rejecting them in this case where Petitioner, by filing an unfair labor practice charge, contends that the employer-employee relationship still exists since her termination was for union activity, and, therefore, unlawful. Shall the State of Florida be required to render financial aid and shall the employer be, in effect, required to subsidize the Petitioner in this instance and not in a strike situation? Does it follow that denying unemployment benefits does not in-

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demands which were the basis of the claim out of which the labor dispute arose. *It was not an abandonment of the labor dispute* itself, because at the time the decision was made by the union to call off the strike and release the petitioner for re-employment, *the claim out of which the labor dispute arose was pending before the National Labor Relations Board,* and, indeed, remained pending up through the date of the final decision by the Florida Unemployment Compensation Board of Review. And it is conceded by the parties to this proceeding that when the National Labor Relations Board hands down its decision it may, *'if it upholds the contentions of the petitioner, represented by her union, require the employer to pay back wages for time lost from the job and reinstate the petitioner to her former employment. It is our view that the labor dispute which, manifestly, was of direct interest to the petitioner and was one in which she was participating, was in 'active progress' within the meaning of [F.S. 443.06 (4)], throughout the whole period for which she was denied unemployment compensation benefits* by the Florida Unemployment Compensation Board of Review.

This is obviously the decision relied upon by the Board of Review and is clearly not so unreasonable as to render it invalid.

terfere with Petitioner's right to strike but it does interfere with her right to file charges to the extent that the processes of the National Labor Relations Board are materially impaired? Clearly, there is neither a basis or a need for such distinctions.

CONCLUSION

Certainly, no more inspiring words can be found in English and American Jurisprudence than those contained in the ancient maxim "for every wrong there is a remedy". Petitioner, however, asks this Court to reject the ruling of the Board of Review herein which rejection by this Court would give Petitioner and certain other employees the right to draw unemployment compensation from the state and also seek reinstatement and back pay through a federal agency. In other words, Petitioner is asking for a double remedy which could, in turn, lead to a double recovery, except in those instances where the State of Florida was willing to step in and file a suit for recoupment of unemployment benefits if a back pay award was also received. Whatever may be said in favor of the decision of this Court in *National Labor Relations Board v. Gullet Gin Co.*, 340 U.S. 361 (1951), authorizing recoupment by the state in such cases, no sound reason exists for expanding the remedies of Petitioner herein, thereby creating possible situations where three instances of litigation by an individual, the state and the federal government could arise. The refusal of unemployment benefits while an unfair labor practice charge is pending clearly does not interfere with the enforcement of the National Labor Relations Act, as amended, to the extent

that the Florida rule attacked herein should be declared unconstitutional. Accordingly, the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Dated this 26th day of September, 1967.

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SUPREME COURT, U. S.

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No. 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MINNIE E. NASH, *Petitioner,*

v.

FLORIDA INDUSTRIAL COMMISSION, *et al.*

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Company's brief drags two "red herrings" into the argument. We dispose of them herein.

1. First, the Company suggests (pp. 5-6) that filing charges with the NLRB cannot be a privilege or immunity of national citizenship because (a) only "employees", and not all citizens, can file such charges, and (b) employees who are not citizens can file such charges. Neither contention is valid.

It is not true that only "employees" can file charges. While they are, to be sure, the Act's intended beneficiaries, this Court has recognized that there is no "limitation on the classes of persons who could lodge complaints with the

Board". *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 17. Even "strangers to the labor contract" are free to file charges. *Id.* at p. 18.

Nor does it matter that non-citizens may file charges This is equally true of every other act which, *when exercised by citizens,* this Court has held to constitute a "privilege or immunity" of national citizenship. Thus, non-citizens may inform of violations of the Federal criminal code, yet a citizen who informs is exercising a "privilege or immunity" of national citizenship. *In re Quarles,* 158 U.S. 532, 536. Likewise, non-citizens may come to the seat of government to assert claims against it, to transact business with it, and to seek its protections, yet these acts too, when engaged in by citizens, have been recognized as "privileges and immunities" of national citizenship. *Slaughterhouse Cases,* 83 U.S. 36, 79.

2. Next, the Company argues (pp. 14-18) that, if a State may deny unemployment benefits to employees engaged in the constitutionally-protected act of striking, it must follow that the State may likewise deny such benefits to employees engaged in the constitutionally-protected act of filing charges. The two situations are, however, totally different, and no constitutional identity can be presumed.

Florida has chosen, in its Unemployment Act, to provide compensation only to those "unemployed through no fault of their own". Florida Statutes (1965) Section 443.02. Florida has thus drawn the common line between the voluntarily and involuntarily unemployed. See, e.g. *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 154 and n. 13 thereat (1946). We do not here challenge as constitutionally unreasonable a classification which denies compensation to those whose unemployment is the result of their own election. We assume, *arguendo,* that Florida may

deny compensation to all who voluntarily absent themselves from work, whether to strike, to participate in a civil rights demonstration, or to go fishing.[1] In so doing, Florida is not *penalizing* the exercise of any constitutional right. It is merely applying a uniform rule to all who voluntarily absent themselves. It is refusing to subsidize voluntary absence.

In the present case, however, petitioner was not voluntarily absent. She was laid off by her employer on May 16, 1965, and she remained on layoff until October 5, 1965. During that entire period her unemployment was involuntary, and was of the type normally compensable under the Act. The filing of charges on June 17, 1965 neither caused nor prolonged petitioner's unemployment.

In disqualifiying petitioner here, therefore, Florida was not applying its uniform policy against subsidizing voluntary absence. Rather, it was *deviating* from its policy of compensating involuntary absence in order to single out, and penalize, those who engage in a constitutionally protected act.

There is thus no logical correlation between the constitutional questions raised by disqualification for striking and those raised by the disqualification here. Accordingly, we need not and do not explore the questions raised by the former. See footnote 1, *supra*. It is sufficient, for this case, to note that *even if* disqualification for striking is constitutional, that would in no way augur a similar ruling with respect to disqualification for filing charges.

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[1] But see *Sherbert* v. *Verner*, 374 U. S. 398 (1963), holding that South Carolina could not disqualify employees whose voluntary absence was predicated upon religion strictures against working on Saturdays.

CONCLUSION

For the reasons set forth hereinabove, and in petitioner's opening brief, the decision below must be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 48.—October Term, 1967.

Minnie E. Nash, Petitioner, v. Florida Industrial Commission et al. } On Writ of Certiorari to the District Court of Appeal of Florida, Third District.

[December 5, 1967.]

Mr. Justice Black delivered the opinion of the Court.

Title 29, United States Code, § 160, authorizes the National Labor Relations Board to initiate unfair labor practice proceedings whenever some person charges that another person has committed such practices. The Board cannot start a proceeding without such a charge being filed with it. See, *e. g.*, *NLRB* v. *National Licorice Co.*, 104 F. 2d 655 (C. A. 2d Cir.), modified on other grounds 309 U. S. 350; *Local 138, Operating Engineers* (*Skura*), 148 N. L. R. B. 679, 681. The crucial question presented here is whether a State can refuse to pay its unemployment insurance to persons solely because they have preferred unfair labor practice charges against their former employer.

The facts are stipulated and need not be stated at length. The petitioner, Mrs. Nash, who previously had been out on strike against her employer, the Stanley Works and Stanley Building Specialties, was, pursuant to union-management agreement, reinstated to her former job on April 14, 1965. Approximately five weeks later, on May 16, 1965, she was laid off by the company because of alleged "slow production," meaning that the company had insufficient work to warrant her retention. Mrs. Nash was unemployed from this time until October 5, 1965, when the company voluntarily called her back to work. She has been allowed unemployment

compensation, under Florida statutes, chapter 443, from the time of her discharge on May 16, up to June 17, but denied any compensation from June 17 to October 5. The reason given for this denial was that on June 17 she filed an unfair labor practice charge against her employer seeking reinstatement and back pay on the ground that the employer had actually laid her off because of her union activities in violation of the National Labor Relations Act, and that this charge was still pending on October 5 when she resumed work. In making this ruling the Florida Industrial Commission relied on § 443.06 of the Florida Unemployment Compensation Law which provides:

> "An individual shall be disqualified for [unemployment] benefits . . . . (4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed. . . ."

The Commission held that the filing of the unfair labor practice charge brought petitioner within the wording of the Act in that her "unemployment" then became "due to a labor dispute." Thus the sole reason that petitioner was disqualified from compensation was that she filed an unfair labor practice charge. According to the Commission, the act of filing was the determinative factor under Florida law which rendered petitioner ineligible for unemployment compensation. The District Court of Appeal of Florida, Third District, denied *per curiam* petitioner's application for writ of certiorari to review the determinations of the Florida Industrial Commission Unemployment Compensation Board of Review. Since such denial by the Florida District Court of Appeals

apparently precludes further state review,[1] we granted certiorari because of the important constitutional question involved, specifically whether the Commission's ruling violates the Supremacy Clause of the Constitution (Art. VI, cl. 2) because it allegedly "frustrates" enforcement of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*[2]

The National Labor Relations Act, *supra*, is a comprehensive regulatory code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal. Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge.[3] Congress has made it clear that it wishes

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[1] The Florida Supreme Court seems to have decided that it lacks jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Court of Appeal. *Callendar* v. *State*, 181 So. 2d 529. While it is true that a district court of appeals may certify a question "of great public interest" to the Florida Supreme Court, this is done upon the District Court of Appeal's own motion, and although litigants may file a suggestion that a particular question be certified, such suggestion has been declared to have "no legal effect." See *Whitaker* v. *Jacksonville Expressway Authority*, 131 So. 2d 22 (1st D. C. A. Fla. 1961). Thus, it is impossible for us to say that under Florida law petitioner here had any right to call upon the State Supreme Court for review. In these circumstances, we therefore are unable to say that the District Court of Appeals was not the highest court in Florida wherein a decision could be had as required by 28 U. S. C. § 1257 (3).

[2] Because of our disposition of the case on Supremacy Clause grounds, we need not consider petitioner's alternative argument that such ruling violates her privileges and immunities of United States citizenship in contravention of the Fourteenth Amendment.

[3] Although § 10 (a) of the Act empowers the Board to prevent unfair labor practices, and thus to protect the employees' § 7 rights, § 10 (b) conditions the exercise of that power on the filing of charges; the Board cannot initiate its own processes.

all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8 (a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges. See *John Hancock Mutual Life Insurance Co.* v. *National Labor Relations Board,* 191 F. 2d 483, 485–486 (C. A. D. C. Cir.); *National Labor Relations Board* v. *Lamar Creamery Co.,* 246 F. 2d 8, 9–10 (C. A. 5th Cir.); *National Labor Relations Board* v. *Syracuse Stamping Co.,* 208 F. 2d 77, 80 (C. A. 2d Cir.). And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges. *National Labor Relations Board* v. *Clearfield Cheese Co.,* 213 F. 2d 70 (C. A. 3d Cir.); *Gibbs Corp.,* 308 F. 2d 247 (C. A. 5th Cir.); *Roberts* v. *National Labor Relations Board,* 350 F. 2d 427 (C. A. D. C. Cir.).

We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited to be taken by the States. The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board. Florida has applied its Unemployment Compensation Law so that an employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure surrendering his right to unemployment compensation, and risk financial ruin if the litigation is protracted. Even the hope of a future award of back pay may mean little to a man of modest means and

heavy responsibilities faced with the immediate severance of sustaining financial funds. It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for the implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan.[4]

In holding that this Florida law as applied in this case conflicts with the Supremacy Clause of the Constitution we but follow the unbroken rule that has come down through the years.

In *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, decided in 1819, this Court declared the States devoid of power "to retard, impede, burden or in any measure control, the operations of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government." In *Davis* v. *Elmira State Bank*, 161 U. S. 275, decided in 1896, this Court declared that a state law cannot stand that "either frustrates the purpose of the national legislation, or impairs the efficiency of those agencies of the Federal Government to discharge the duties for the performance of which they were created." And again in *Hill* v. *Florida*, 325 U. S. 538, 542–543, decided in 1945, this Court struck down a labor

[4] Respondents suggest that petitioner might enjoy a windfall if she was paid compensation and was subsequently awarded back pay by the Labor Board. This argument is unresponsive to the issue in dispute, however, since a State is free to recoup compensation payments made during any period covered by a back-pay award. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365, n. 1.

regulation saying it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . ."

All of the cases just cited and many more support our invalidation under the supremacy clause of the Florida Unemployment Compensation Law as here applied.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.